Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

SHIRLEY A. ROCKSTEAD and CAROL J. HENDERSON,
Petitioners,

v.

CITY OF CRYSTAL LAKE, an Illinois municipal corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, as suggested by the late Chief Justice Rehnquist's concurrence in *San Remo Hotel v. County of San Francisco*, 545 U.S. 323, 348, 125 S. Ct. 2491, 2507 (2005) (joined by three other justices), the state-litigation requirement of *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), whereby a Fifth Amendment Takings claim is not ripe in federal court until the landowner first seeks and is denied compensation in state court, should be reconsidered.

2. Whether *Williamson County*'s state-litigation ripeness rule should apply to physical takings cases.

3. Whether it is futile to require petitioners to attempt to fulfill *Williamson County*'s state-litigation requirement by continuing their state court challenge of well-established state law doctrine announced by the Illinois Supreme and appellate courts that unequivocably deny petitioners a state inverse condemnation remedy.

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PETITION FOR A WRIT OF CERTIORARI

Shirley A. Rockstead and Carol J. Henderson respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.[1]

OPINIONS BELOW

The April 10, 2007 Opinion of the Court of Appeals (App., *infra*, 1a-10a) is as yet unreported in the Federal Reporter. The December 29, 2005 Opinion and Order of the district court (App., *infra*, 13a-27a) is reported at 431 F. Supp. 2d 804.

Two Orders of the Circuit Court of the Nineteenth Judicial Circuit, McHenry County, Illinois ("McHenry County Circuit Court") are relevant: the first, entitled "Order on Pending Motions" was dated July 14, 2004 (App., *infra*, 45a-56a), and the second, entitled "Order of Motion for Partial Summary Judgment," dated July 27, 2005 (App., *infra*, 29a-44a).

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 2006 (App., *infra*, 12a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution

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[1] For the convenience of the Court, petitioners note that the Petition for a Writ of Certiorari in *McNamara v. City of Rittman, Ohio* (No. 06-1481), filed in this Court on May 10, 2007 and still pending, presents closely related questions.

provides, in pertinent part: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

28 U.S.C. § 1738 provides in pertinent part:

> The records and judicial proceedings of any court of any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

42 U.S.C. § 1983 provides in pertinent part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Article I, Section 15 of the Illinois Constitution provides that:

> Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law.

STATEMENT

This is a § 1983 Fifth Amendment Just Compensation action involving a physical invasion by reason of flooding induced by the respondent municipality that has permanently degraded a substantial part of petitioners' land into valueless wetlands.

This case presents important and recurring questions about the continuing validity of the "state-litigation" requirement of *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985), *i.e.*, that a Fifth Amendment Takings claim under 42 U.S.C. § 1983 is not ripe for adjudication in federal court until the aggrieved property owner has exhausted all adequate state law compensation remedies.[2]

In his concurrence in *San Remo Hotel v. County of San Francisco*, 545 U.S. 323, 348, 125 S. Ct. 2491, 2507 (2005), joined by Justices O'Connor, Kennedy and Thomas, the late Chief Justice Rehnquist stated his belief that "the Court should reconsider whether plaintiffs asserting a Fifth Amendment Takings claim based on the final decision of a state or local government entity must first seek compensation in state courts." 545 U.S. at 352, 125 S. Ct. at 2510.

Thus, petitioners seek reconsideration of *Williamson County*'s state-litigation rule. In lieu thereof, they seek to

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[2] This requirement – also called the *Williamson County* "exhaustion" requirement – is the second of a two-pronged ripeness test. The first prong – finality, *Williamson County*, 473 U.S. at 194 – is automatically satisfied because this case involves a physical invasion, as the lower federal courts have repeatedly held. *See, e.g., Forseth v. Village of Sussex*, 199 F.3d 363, 372 n.12 (7th Cir. 2000) (a physical invasion is a final decision); *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 91 (1st Cir. 2003); and *Daniel v. County of Santa Barbara*, 288 F.3d 375, 382 (9th Cir. 2002).

exclude takings by physical invasion from that rule's operation. Finally, under the unique facts of this case, they ask that the Court clarify the so-called futility exception to the state-litigation rule and find that they need not continue their futile pursuit of state compensation remedies that are *per se* unavailable to them.

Factual and Procedural Background – By this § 1983 action, petitioners Shirley A. Rockstead and Carol J. Henderson, the co-owners of land in Crystal Lake, Illinois, seek compensation from respondent City of Crystal Lake, Illinois ("City") under the Takings Clause of the Fifth Amendment because intermittent but regularly recurring flooding caused by the City's construction of certain municipal facilities has degraded much of their land into permanently unusable and valueless wetlands.[3]

The Illinois Case – Prior to filing this case, petitioners pursued eleven fruitless years of Illinois state court litigation seeking first damages at law, and then "inverse condemnation."

Petitioners' state court case seeking damages at law and an injunction was filed in 1994 in Cook County. After two years of arguments about venue, the case was transferred to the McHenry County Circuit Court. Over the succeeding years, the City repeatedly but unsuccessfully attacked petitioners' damage claims on the grounds of municipal immunity. Then, in 2003, as the case was nearing trial, the Illinois Supreme Court changed the law on municipal immunity for flooding cases.

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[3] Petitioners each own an undivided one-quarter interest in the property as do the heirs of their two deceased sisters. The four sisters each inherited their one-quarter interest from their mother in 1974. (R. 1: Complaint, ¶ 8). The deceased sisters and their heirs did not join in petitioners' attempts to obtain damage relief or just compensation and thus were not and are not parties in the state court case or this case.

Van Meter v. Darien Park District, 207 Ill. 2d 359; 799 N.E.2d 273 (2003). As a result, in mid-2004, the McHenry County Circuit Court granted summary judgment against petitioners on their damage claim on the grounds that the City was, after all, immune from suit for damages at law. (App., *infra*, 52a).

Petitioners then added a new claim for inverse condemnation under the Just Compensation Clause of Article I, § 15 of the Illinois Constitution.[4]

Petitioners did not advance a § 1983 Fifth Amendment takings claim.[5]

The City moved for summary judgment on the inverse

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[4] Inverse condemnation is simply a mandamus action brought by a land owner to compel a governmental body to institute proceedings under the Illinois Eminent Domain Act. *Rosenthal v. City of Crystal Lake*, 171 Ill. App. 3d 428, 437, 525 N.E.2d 1176, 1182 (2d Dist. 1988) ("[w]here there has been a taking without just compensation, the owner may bring a mandamus action against the responsible agency to compel the institution of eminent domain proceedings."); *see also* Illinois Eminent Domain Act, 735 ILCS § 5/7-101, *et seq.* (2006) (current version at 735 ILCS § 30/1-1-1, *et seq.*), esp. § 5/7-122 (now § 30/10-5-65) (allowing reimbursement of costs and fees in inverse condemnation mandamus action as part of eminent domain award).

[5] *See* Argument, *infra*, p. 26. First, the Illinois Supreme Court applies *Williamson County*'s ripeness rules to federal takings claims filed in the Illinois state courts. *Beneficial Dev. Corp. v. City of Highland Park*, 161 Ill. 2d 321, 328, 641 N.E.2d 435, 438 (1994). Second, the City could have prevented the state court consideration of the § 1983 claim pursuant to 28 U.S.C. § 1441 and *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156 (1997) by removing the case to federal court, and then obtaining a ripeness dismissal of the § 1983 claim and a remand of the state compensation claim. *Key Outdoor, Inc. v. City of Galesburg*, 327 F.3d 549 (7th Cir. 2003).

condemnation claim on the ground that in flooding cases Illinois eminent domain law allows a compensable taking only when there was a permanent inundation. The City cited three decisions that stand for that precise proposition: two from the Illinois Supreme Court and the third from the Second District Illinois Appellate Court which has appellate jurisdiction over the McHenry County Circuit Court. *People ex rel. Pratt v. Rosenfield*, 399 Ill. 247, 251, 77 N.E.2d 697 (1948) (no taking without permanent inundation); *Herget Nat'l Bank v. Kenney*, 105 Ill. 2d 405, 475 N.E.2d 863 (1985) (same); *Luperini v. County of Du Page*, 265 Ill. App. 3d 84, 637 N.E.2d 1264 (2d Dist. 1994) (same).

The City argued that these precedents – requiring "permanent surface water, either standing or running on the property" as a necessary element of a taking by flooding – were "well-settled" Illinois law. And, argued the City, petitioners had no proof to meet that requirement. (Circuit Court Record: 2/15/05 City Mot. for Partial SJ).

In response, petitioners conceded that they could show neither a permanent inundation nor standing or running water on their property. Indeed, they had never contended that the flooding of their land was permanent, but only that it was intermittent but permanently recurring and had permanently degraded much of their land into unusable valueless wetlands.[6]

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[6] *Compare, United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 (1985) (no requirement of permanent surface inundation or flooding to qualify as wetlands under regulations promulgated under Clean Water Act).

The regulations of the United States Army Corps of Engineers (Corps) and Environmental Protection Agency (EPA), the federal agencies charged with primary responsibility for administering of the Clean Water Act, define wetlands without any

(continued...)

(App., *infra*, 35a).

On July 27, 2005, as urged by the City, the McHenry County Circuit Court granted the City's Motion for Summary Judgment on Petitioners' inverse condemnation claim, ruling that intermittent flooding did not constitute a compensable taking under Illinois law. (*Id.*, App., *infra*, 41a-42a). After citing the pertinent Illinois decisions and quoting *Luperini* at length, the Circuit Court held:

> Although this Court believes it creates a harsh result, it appears that the current state of the law in the State of Illinois requires that there must be evidence of permanent surface water on property caused by the public improvement before a finding can be made that a physical invasion tantamount to a taking has occurred. The Plaintiffs have not and cannot present such evidence in this case. (*Id.*, App., *infra*, 41a-42a).

This Case – Unlike Illinois law, federal takings law does seem to require compensation for a taking caused by

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[6](...continued)
requirement of a permanent surface inundation or flooding. 33 C.F.R. § 328.3(b) (Corps Rule); 40 C.F.R. § 230.3(t) (EPA Rule). *See also* Wetlands Research Program Technical Report Y-87-1 (on-line edition), pp. 9-10 (Jan. 1987), http://www.saj.usace.army.mil/permit/documents/87manual.pdf and *Field Indicators of Hydric Soils in the United States*, Version 6.0. G.W. Hurt and L.M. Vasilas (eds.), p. 1 (USDA, NRCS 2006) (hydric soils result from repeated periods of saturation and/or inundation for more than a few days; no permanent surface inundation required). (Copies lodged with Clerk of this Court).

intermittent flooding. *United States v. Cress*, 243 U.S. 316, 328 (1917) ("There is no difference of kind, but only of degree, between a permanent condition of continual overflow by back-water and a permanent liability to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other.")

Thus, instead of appealing the Circuit Court's orders, petitioners accepted Illinois law as announced by the Circuit Court and instead filed this case in federal district court in Chicago seeking Just Compensation under the Fifth Amendment Takings Clause.[7] Only federal question jurisdiction under 28 U.S.C. § 1331 was invoked. (R. 1: Complaint).

In part, petitioners alleged that further resort to the Illinois court was futile because they could not meet an essential element for just compensation under Illinois law, *i.e.*, permanent flooding. (R. 1: Complaint, ¶¶ 33-34). Petitioners based that futility argument on the suggestion in *Williamson County* that exhaustion would be excused when a state compensation procedure is either "unavailable or inadequate." 473 U.S. at 196-197.[8] The Seventh and other circuit courts of

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[7] The state court case remains pending on petitioners' damage claim against the railroad and their injunctive claim against the railroad and the City. Illinois law provides a procedure for an interlocutory appeal. Illinois Supreme Court Rules 304 & 308. Of course, petitioners could also appeal once the case is finally disposed of. Illinois Supreme Court Rule 303. As the City pointed out to the District Court in this case (R. 11, p. 3), Illinois Supreme Court Rule 301 provides that "an appeal is a continuation of the proceeding."

[8] The language of *Williamson County* in which the circuits found this "futility" exception was as follows: "Respondent has not shown that the inverse condemnation procedure is unavailable or

(continued...)

appeals have labeled this a "futility" exception to *Williamson County*'s exhaustion requirement. *See, e.g., Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445, 456 (7th Cir. 2002); *Manufactured Home Cmtys., Inc. v. City of San Jose*, 420 F.3d 1022, 1035 (9th Cir. 2005); and *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d at 93.[9]

The City then reversed course. Whereas it had argued to the McHenry County Circuit Court that the requirement of permanent inundation was "well-settled" Illinois law, it argued to the district court that petitioners should have appealed the Circuit Court's ruling since maybe it was not quite so well-settled after all:

> If [petitioners] were to appeal this decision, the appellate court could disagree with the trial court's factual or legal conclusions and hold that [petitioners] are entitled to compensation under the current law. Or, [petitioners] could persuade the appellate court that the current law is indeed "harsh" and needs to be overruled, enabling

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[8](...continued)
inadequate and until it has utilized that procedure, its taking claim is premature." 473 U.S. at 196-197. *See also* Concurrence of Justice Brennan. 473 U.S. at 201.

[9] This Court has considered futility only in connection with the finality prong of *Williamson County*. *Palazzolo v. Rhode Island*, 533 U.S. 606, 624 (2001) (repeated applications to other state agencies would be futile and were not required to meet finality prong); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 (1997) (only finality prong at issue); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986) (scaled-down development applications might be approved and therefore not futile to require them to reach a final decision).

> [petitioners] to be compensated. Either way, the appellate court could provide [petitioners] with just compensation, rendering this federal case unnecessary. (R. 11: City's Mot. to Dis., p. 4).

On those grounds, the district court dismissed this case on the grounds of lack of *Williamson County* ripeness, ruling that petitioners should have appealed the McHenry County Circuit Court's dismissal of their state inverse condemnation claim to the Illinois appellate courts.

First, the district court held that the *Williamson County* exhaustion requirement includes state court appellate procedures that must be exhausted before any § 1983 claim will be ripe in federal court. (App., *infra*, 19a-20a).

Second, even though Illinois law is so clearly against petitioners' position, the district court refused to accept the Illinois rule of law, long-standing and carefully applied by the state trial court to petitioners' land, that permanent flooding was a required prerequisite to an inverse condemnation claim under Illinois law. Thus, the district court rejected petitioners' argument that their state court appeal was inadequate and therefore futile. In the district court's view, flooding is "a question of degree," and the McHenry County Circuit Court's ruling turned on an interpretation of facts and law. Thus, the district court suggested, an Illinois appellate court might distinguish this case from the controlling Illinois decisions that require permanent flooding. Further, the district court saw no indication that the Illinois appellate court had "dug in its heels" on the requirement of permanent flooding. Therefore, said the district court, petitioners must appeal and that they "may lose on the merits, is neither here nor there." (App., *infra*, 25a) (citations and internal quotation marks omitted).

Although not briefed by the parties, the district court also alluded to what has become known as the "*Williamson*

trap," *i.e.*, that under the preclusive "full faith and credit" effect of 28 U.S.C. § 1738, Petitioners' failure to raise their federal takings claim in state court will bar them from ever raising it in federal court. Citing *San Remo Hotel*, 545 U.S. at 345-46, 125 S. Ct. at 2506, the District Court stated the matter as follows:

> A party cannot avoid the full faith and credit clause by reserving federal claims for litigation in federal court. The *San Remo* decision affirms that despite the preclusive effect that a state court decision may have on a future federal case, plaintiffs must still first seek compensation in state courts.

This Appeal – Petitioners timely appealed to the Seventh Circuit. They moved for an early argument and expedited consideration so that they could promptly return to state court, if necessary, and fully protect their rights and pursue any further appellate remedies, albeit inadequate, on their Illinois takings claim and protect by whatever means necessary their federal takings claim. (*See* Appellant's May 1, 2006 Motion to Schedule Oral Argument for July 11 or 12 and for Accelerated Consideration of Appeal).

The case was argued on October 31, 2006, and that afternoon the Court of Appeals entered an order that "[j]udgment is affirmed, opinion to follow." (App., *infra*, 12a).

The Opinion and Judgment of affirmance were entered on April 10, 2007. Also committing petitioners to the state court by requiring an appeal of the Circuit Court's no inverse condemnation without permanent flooding ruling, the panel relied on a slightly different incarnation of the district court's conclusion that the Illinois state appellate court might well reconsider its hard and fast rule that only permanent flooding amounts to a taking:

> Intermittent flooding . . . [which transforms] an owner's property into permanent wetlands is hard to distinguish from permanent flooding. . . . (App., *infra*, 6a).
>
> We see a glimmering of recognition of this point in *Luperini* [the controlling Illinois appellate precedent] (*Id.*).
>
> The Supreme Court of Illinois has not weighed in on the issue since . . . 1948, more than half a century ago. It is premature to conclude that if faced with a case such as this it would deny relief on the basis of a mechanical application of the "temporary accumulations" doctrine. (App., *infra*, at 7a).

In sum, like the district court, the Seventh Circuit simply refused to accept the long-standing "permanent flooding" rule adopted by the Illinois appellate courts and applied by the McHenry County Circuit Court to petitioners' land. Thus, in strict conformance with *Williamson County*'s state-litigation requirement, the Court ruled that petitioners must pursue the state inverse condemnation to its inevitable unhappy conclusion in the Illinois appellate courts on the chance that this long-established rule of Illinois inverse condemnation law might not be "mechanically appli[ed]." (*Id.*).

Moreover, the Panel suggested that, by asserting that they had no remedy under Illinois inverse condemnation law, petitioners "[shot] themselves in the foot" and would find that sentence quoted against them by the respondent City once litigation resumed in state court. (App., *infra*, 7a-8a). The Court made nothing of the fact that the respondent City argued in the McHenry County Circuit Court that the permanent

flooding rule was settled, but then reversed course in the district court and argued that the rule might somehow be subject to question. And, more importantly, the Court of Appeals made no mention of the fact that, as petitioners will now show, continued pursuit of their inverse condemnation claim in state court would extinguish, not ripen, petitioners' right to later file their Fifth Amendment takings claim in federal court.

REASONS FOR GRANTING THE PETITION

Concurring in *San Remo,* the late Chief Justice Rehnquist, joined by Justices O'Connor, Kennedy, and Thomas, recommended that "in an appropriate case," 545 U.S. at 352, 125 S. Ct. at 2510, this Court should reconsider the exhaustion prong of *Williamson County*, because it "may have been mistaken." 545 U.S. at 348, 125 S. Ct. at 2507.

This is that case. *Williamson County*'s "justifications for its state-litigation requirement are suspect [and] its impact on takings plaintiffs is dramatic." *Id.* Therefore, that requirement should be overruled. In any event, there are no legitimate prudential or constitutional reasons for the blind application of this state-litigation requirement to cases, like this one, involving only physical takings. Finally, if the rule is to remain in place and if it must include physical takings case, petitioners have fully met their burdens by pursuing a futile state claim in the state trial court.

1. *Williamson County* Should Be Reconsidered Because, When Coupled With The Full Faith And Credit Statute, It Extinguishes, Not Ripens, The Right To Bring A Fifth Amendment Takings Action In Federal Court.

Petitioners do not blithely ask this Court to overturn one of its holdings, but note instead that "when governing decisions

are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944))).

Stare decisis "is at its weakest" when a prior decision involved the interpretation of the United States Constitution because that interpretation can be altered only by constitutional amendment or by this Court. *Agostini v. Felton*, 521 U.S. 203, 217 (1997).

Furthermore, stare decisis is of substantially less force when a precedent is "outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration." *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986); *see also Teague v. Lane*, 489 U.S. 288, 333 (1989) (Brennan, J., dissenting) (quoting *Vasquez*).

Since the issue presented involves at bottom an interpretation of the Just Compensation Clause of the Fifth Amendment, the stare decisis effect of *Williamson County* has less force. The polite puzzlement of the lower federal courts and their struggles to apply *Williamson County*, and the firestorm of scholarly criticism (*see* Note 10, *infra*, p. 15), suggest that the exhaustion rule is "outdated, ill-founded, [and] unworkable." But surely Chief Justice Rehnquist's *San Remo* concurrence demonstrates that *Williamson County*'s state-litigation requirement is legitimately vulnerable to serious reconsideration.

Thus, Petitioners respectfully submit that reconsideration of *Williamson County*'s exhaustion requirement is fully warranted.

a. The Interaction Of *Williamson County*'s Exhaustion Requirement With 28 U.S.C. § 1738 Extinguishes, Not Ripens, A Federal

Court Section 1983 Fifth Amendment Takings Claim.

As Chief Justice Rehnquist's *San Remo* concurrence noted: the exhaustion prong of "*Williamson County* all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation clause." 545 U.S. at 351, 125 S. Ct. at 2509.

This is the "catch-22," the "*Williamson* trap," referred to by the district court, (App., *infra*, 26a), that has provoked an outpouring of scholarly comment[10] most critical, some

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[10] Stephen E. Abraham, *Williamson County Fifteen Years Later: When Is a Takings Claim (Ever) Ripe?*, 36 Real Prop. Prob. & Tr. J. 101 (2001); Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-parody Stage*, 36 Urb. Law. 671 (2004); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U.J.L. & Pol'y 99, 102 (2000); Michael M. Berger, *Vindicating the Rights of Private Land Development in the Courts*, 32 Urb. Law. 941 (2000); Brian W. Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 Hofstra Prop. L.J. 73 (1988); J. David Breemer, *Overcoming Williamson County's Troubling State Procedures Rule: How The England Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209, 210 (2003); John J. Delaney & Duane J. Desiderio, *Survey of Federal Land Use Takings Cases 1990-1998*, 31 Urb. Law. 202 (1999); John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urb. Law. 195, 246 (1999); Robert H. Freilich, Adrienne H. Wyker & Leslie Eriksen Harris, *Federalism at the Millennium: A Review of U.S. Supreme Court Cases Affecting State and Local Government*, 31 Urb. Law. 683

(continued...)

surprisingly harsh, and that has perplexed the lower federal

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[10](...continued)
(1999); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 Colum. L. Rev. 1211 (2004); Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 Urb. Law. 307 (1998); Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W. L. Rev. 1, 22-24 (1992); Max Kidalov & Richard H. Seamon, *The Missing Pieces of the Debate Over Federal Property Rights Legislation*, 27 Hastings Const. L.Q. 1, 5 (1999) ("The U.S. Supreme Court has developed rules that make it almost impossible for federal courts to remedy violations of the Just Compensation Clause by local land-use agencies."); Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under Williamson County*, 26 Ecology L.Q. 1, 2 (1999); Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239 (2000); Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Cases*, 10 J. Land Use & Envtl. L. 91, 92 n.3 (1994); Thomas E. Roberts, *Procedural Implications of Williamson County/First English in Regulatory Takings Litigation: Reservations, Removal, Diversity, Supplemental Jurisdiction, Rooker-Feldman, and Res Judicata*, 31 Envtl. L. Rep. 10353 (2001); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37 (1995); Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?*, 6 Fordham Envtl. L.J. 523 (1995); Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 Wm. and Mary L. Rev. 251 (2006); and George A. Yuhas, *The Ever-Shrinking Scope of Federal Court Takings Litigation*, 32 Urb. Law. 465 (2000).

courts.[11]

On its face, the state-litigation prong of *Williamson County* seems to mean that once such state compensation remedies are unsuccessful, the concomitant federal claim, having been thereby "ripened," can then be asserted (or re-asserted) in federal court. *Williamson County*'s use of the adjective "premature" to describe the federal claim suggests as much,[12] 473 U.S. at 185-86, 194-95, 197 & 200. The Seventh and Eighth Circuits have so concluded. *Forseth v. Village of Sussex*, 199 F.3d at 373. ("Should Plaintiffs sufficiently pursue their case in state court only to be denied relief, they may then seek relief in federal court on their federal substantive due process and takings claims."); *Watson v. City of Chicago*, 2000 U.S. Dist. LEXIS 5947 (N.D. Ill. 2000) (same, following *Forseth*); *Kottschade v. City of Rochester*, 319 F.3d 1038, 1042 (8th Cir. 2003) ("This action is without prejudice to the right of the plaintiff, if he files a state-court case and loses, to file a new action in a federal court and make whatever arguments he wishes with respect to the effect of the prior state-court adjudication.").

The fact is, however, that due to the preclusive effect of the full faith and credit statute, 28 U.S.C. § 1738 – encompassing, as it does, the doctrines of res judicata (issue preclusion) and collateral estoppel (claim preclusion) – the process of "ripening" the federal claim actually bars a federal

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[11] *See, e.g., DLX, Inc. v. Kentucky*, 381 F.3d 511, 518 (6th Cir 2004) (referring to this dilemma as "[t]he catch-22 of the "*Williamson* trap"); *Franco v. District of Columbia*, 2006 U.S. Dist. LEXIS 73534, at *18 (D.D.C. Oct. 10, 2006).

[12] Premature: happening, arriving, existing, or performed before the proper, usual, or intended time. *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003).

court from hearing it.[13] *San Remo*, 545 U.S. at 336, 125 S. Ct. at 2500 (quoting *Allen v. McCurry*, 449 U.S. 90, 94-96 (1980)). And, as Chief Justice Rehnquist's concurrence in *San Remo* recognizes, there is likely nothing a claimant can do to avoid that effect. 545 U.S. at 351, 125 S. Ct. at 2509. The reasons are simple:

San Remo held that, if state law so provides, any issues that form a part of a federal Just Compensation claim and were previously decided in a state court case cannot be relitigated in a federal court even though the state court may have resolved those issues as part of deciding state law Just Compensation claims. *San Remo*, 545 U.S. at 347, 125 S. Ct. at 2507. More precisely, if state law bars relitigation of an already-decided issue in state courts, § 1738 gives that bar rule full faith and credit and bars relitigation of that issue in federal court. Simply stated, § 1738 requires a federal court to honor the issue preclusion rules of state law.

The courts of Illinois reflect this fundamental principle of the law of judgments, whether coined as a matter of res judicata or collateral estoppel, and bar relitigation of issues already decided in an earlier case. *Torcasso v. Standard Outdoor Sales, Inc.*, 157 Ill. 2d 484, 490, 626 N.E.2d 225, 228 (1993) ("res judicata extends . . . to every matter that was actually determined in the prior suit . . . ."); *Du Page Forklift Serv. v. Material Handling Servs.*, 195 Ill. 2d 71, 78, 744 N.E.2d 845, 849 (2001) ("once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive

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[13] The full faith and credit statute arises from Article IV, § 1 of the United States Constitution that provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

in a subsequent suit based on a different cause of action involving a party to the prior litigation.").

Thus, if an issue that forms a part of a Fifth Amendment Just Compensation claim is decided in a state court proceeding, it is barred from relitigation in the subsequent federal court takings case promised by *Williamson County*. *San Remo*, 545 U.S. at 347, 125 S. Ct. at 2507.

This has two permutations: first, if a claimant *does* assert a Fifth Amendment Takings claim in his required state court proceeding and loses, or, second, if an element of such a federal claim coincides with an element of state compensation law and is lost, the matter is concluded: the claimant is barred from relitigating that claim or element in federal court if he or she would be barred from relitigating either in a subsequent state court action.

Conversely, under the usual rules of res judicata, if a just compensation claimant *does not* assert a federal Just Compensation claim in the state court action required by *Williamson County*, relitigation of that claim in federal court is barred. If state law so provides, § 1738 requires a federal court to honor the res judicata rule barring litigation of a claim that *could have been, but was not*, advanced in state court. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 85 (1984) (state-court judgments have res judicata claim-preclusive effects in § 1983 actions, barring constitutional claims not brought in prior state-court contract action). This is precisely the rule in Illinois. *Torcasso*, 157 Ill. 2d at 490, 626 N.E.2d at 228 ("[R]es judicata extends not only to every matter that was actually determined in the prior suit but to every other matter that *might have been raised* and determined in it.") (emphasis added).

Therefore, a federal takings claim not brought in the state court action cannot be considered in a subsequent federal court action. Several federal circuits have so held. *Wilkinson*

v. Pitkin County Bd. of County Comm'rs, 142 F.3d 1319, 1324 (10th Cir. 1998); *Palomar Mobilehome Park Ass'n v. City of San Marcos,* 989 F.2d 362, 364-65 (9th Cir. 1993); *Peduto v. City of N. Wildwood*, 878 F.2d 725, 729 (3d Cir. 1989).

The effect of the interaction of *Williamson County*'s exhaustion rule with § 1738 is simply to bar federal court consideration of § 1983 Just Compensation claims in almost all conceivable situations. *Williamson County* treats that claim as premature for federal court adjudication, but once the process of ripening the claim is complete, § 1738 extinguishes it. A claimant cannot litigate a federal Just Compensation claim in federal court, whether that claim or an essential part of it *was* or *was not* litigated in state court.

This is the "dramatic effect" on takings plaintiffs suggested by the late Chief Justice's *San Remo* concurrence, 545 U.S. at 348, 125 S. Ct. at 2507. It is the "catch-22," "The *Williamson* trap," described by the lower courts and commentators.

There's the rub that brings petitioners to this Court.

b. The Justifications for *Williamson County*'s State-Litigation Requirement Are Suspect.

It is difficult to reconcile the counter-intuitive interaction of *Williamson County*'s state-litigation requirement and § 1738 with the "concepts of 'fairness and justice' that underlie the Takings Clause." *Palazzolo v. Rhode Island*, 533 U.S. at 633 (internal citations omitted). Though those concepts may be "less than fully determinate," *id.*, and though they may relate largely to the protecting citizens from the unjust and unfair imposition of public obligations on the few, *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), surely the procedural route toward the vindication of this important Constitutional right should be just and fair as well. One thing is for sure: citizens should not confront a "catch-22" or a "trap"

as to where, how and when they invoke judicial remedies to vindicate a constitutional right. Moreover, the reasons underlying any rule that excludes citizens from the federal courts should have reasoned support in law and policy and should at least be defensible. Petitioners respectfully submit that *Williamson County* fails those tests. In the late Chief Justice's words, the "justifications for [*Williamson County*'s] state-litigation requirement are suspect." 545 U.S. at 352, 125 S. Ct. at 2509-10.

The Basis for the State-Litigation Requirement – Is It Constitutional or Prudential? – Williamson County suggested that the state-litigation requirement stemmed from the Fifth Amendment: "The nature of the constitutional right . . . requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action." *Williamson County*, 473 U.S. at 194-95 & n.13. The rationale is that the Fifth Amendment does not prevent takings but only takings without compensation, so that the Takings Clause is not violated until a claimant has "unsuccessfully attempted to obtain just compensation through the procedures provided by the State." *Id.*

While that concept recurs in this Court's more recent takings cases, *see City of Monterey v. Del Monte Dunes,* 526 U.S. 687, 714 (1999), it is directly contrary on its face to the line of this Court's decisions *in physical takings cases* that the constitutional violation occurs at the time of the taking. In *United States v. Dickinson*, an intermittent flooding case, the Court stated that "the land was taken when it was taken and an obligation to pay for it then arose." 331 U.S. 745, 751 (1947). *United States v. Dow*, a physical taking case, held that "if the United States has entered into possession of the property prior to the acquisition of title, it is the former event which constitutes the act of taking." 357 U.S. 17, 22 (1958). *United States v. Clarke*, another physical taking case, quoted *Dow* and

held that "[w]hen a taking occurs by physical invasion . . . the usual rule is that the time of the invasion constitutes the act of taking, and '[it] is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued.'" 445 U.S. 253, 258 (1980) (alteration of quotation in original).

Thus, if *Williamson County*'s state-litigation requirement is constitutionally based on the Takings Clause, it is incongruent, if not downright contradictory to the rule, at least in physical takings cases, that the constitutional takings claim accrues or arises or occurs at the time of the taking.[14]

Perhaps because of this incongruity, at least one decision of this Court has referred to the state-litigation rule as merely a "prudential requirement." *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725, 733-734 (1997). Indeed, *San Remo* uses the same rubric as well. 545 U.S. at 342, 125 S. Ct. at 2504.

But, an incongruity lurks here too. "Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-808 (2003) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. at 148-149; *accord, Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 732-733 (1998). But, a *prudential* ripeness rule requires the evaluation of "both the fitness of the issues for judicial decision and the hardship to

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[14] Petitioners respectfully submit that, for this reason alone, if *Williamson County* is to survive, it should exclude physical takings cases.

the parties of withholding court consideration." *Suitum*, 520 U.S. at 743 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967); *accord, Texas v. United States*, 523 U.S. 296, 301 (1998).

Thus, if *Williamson County*'s state-litigation rule is prudential, then an evaluation of the fitness of the issues for judicial decision and the hardship on the parties seems to be required, especially if the concepts underlying the Fifth Amendment's Takings Clause are "justice and fairness."

Because of the lack of guidance on the basis of the *Williamson County* state-litigation rule, neither the district court nor the Court of Appeals herein gave either factor any consideration. Surely, petitioners' claim of a permanent physical taking – here by intermittent but recurring flooding – is fit for review. Physical takings cases "are relatively rare, easily identified and usually represent a greater affront to individual property rights." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002). And, "[w]hether a permanent physical occupation has occurred presents relatively few problems of proof." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437 (1982).[15]

So there is no difficult balancing required in

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[15] And this case does not fall within the class of intermittent flooding cases alluded to in *Tahoe-Sierra*, 535 U.S. at 436, because the flooding here has so saturated petitioners' land that it has been permanently degraded to wetlands even though inundations of the surface come and go. Indeed, as in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1012 (1992), petitioners have made no claim of a temporary taking in the courts below. Therefore, because a temporary taking issue is not presented, this case can be decided "on the permanent taking theory that both the trial court and the State Supreme Court had addressed." *Tahoe-Sierra*, 535 U.S. at 330.

determining the existence or extent of the alleged taking. Instead, a *per se* rule of compensation applies: "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner . . . regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Tahoe-Sierra*, 535 U.S. at 322 (citation omitted).

Moreover, the hardship to petitioners from not hearing this case is manifest. Each year, petitioners' inheritance degrades even more. With the law's delay, the City has masterfully frustrated petitioners' efforts to gain Just Compensation. With all the insolence of office, the City piled up a mound of dirt and hid the drainage pipe that first cut off the drainage and inexorably flooded petitioners' land. Taking arms, petitioners sought damages at law in the state court and failed. They sought constitutional compensation under the Illinois Constitution but failed because of a quirk in Illinois law. Then, they are told that until they seek to change that rule by recourse to the Illinois appellate courts, their Fifth Amendment Just Compensation claim cannot be heard by the federal courts. If *Williamson County*'s state-litigation rule is prudential, surely these hardships weigh somewhere in the balance.

Of the many categories of § 1983 plaintiffs, why must only Takings Claimants exhaust state remedies? – This result is the more puzzling because of the different rule for most other § 1983 actions. As the late Chief Justice Rehnquist's *San Remo* concurrence points out, "it is not obvious that either constitutional or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim." 545 U.S. at 349, 125 S. Ct. at 2508. His concurrence cites *Patsy v. Bd. of Regents of Florida*, 457 U.S. 496 (1982) for the proposition that a § 1983 plaintiff is not required to exhaust state administrative remedies. In virtually all other § 1983 situations, this is a firmly established principle.

"Ordinarily, plaintiffs pursuing civil rights claims under 42 U.S.C. § 1983 need not exhaust administrative remedies before filing suit in court." *Porter v. Nussle*, 534 U.S. 516, 523 (2002). Beginning with *McNeese v. Board of Education*, 373 U.S. 668, 671-673 (1963), this Court has on numerous occasions rejected the argument that a § 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies. *See Barry v. Barchi*, 443 U.S. 55, 63 n.10 (1979); *Gibson v. Berryhill*, 411 U.S. 564, 574 (1973); *Carter v. Stanton*, 405 U.S. 669, 671 (1972); *Wilwording v. Swenson*, 404 U.S. 249, 251 (1971); *Houghton v. Shafer*, 392 U.S. 639, 640 (1968); *King v. Smith*, 392 U.S. 309, 312 n.4 (1968); *Damico v. California*, 389 U.S. 416 (1967).

Indeed, as *Steffel v. Thompson* held, "[w]hen federal claims are premised on [§ 1983] – as they are here – we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights." 415 U.S. 452, 472-473 (1974). Moreover, from the time of *Monroe v. Pape*, 365 U.S. 167 (1961) *overruled on other grounds, Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978), a § 1983 claimant has not been required to exhaust state judicial remedies.

This Court has not explained why only takings claimants must exhaust state remedies before seeking the protection of the federal court. But, *Williamson County*'s state-litigation rule does just that. Thus, yet another incongruity, since it seems hard to reconcile the state-litigation rule with this Court's explanation that "the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should [not] be relegated to the status of a poor relation . . . ." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). This difference justifies a reasoned

consideration by this Court.[16]

The state courts do not have any greater expertise in resolving challenges to land use regulations – The late Chief Justice's concurrence adequately questions *San Remo's* reliance on the principle of comity on tax matters reflected in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981) as a justification for the state-litigation rule. As he explained, there is no comparable history of comity in the area of land use regulations. 545 U.S. at 349, 125 S. Ct. at 2508. Petitioners need add nothing more and only stress his point that the federal courts routinely are involved in challenges to municipal land use regulations under the First Amendment and Equal Protection Clause. 545 U.S. at 350-51, 125 S. Ct. at 2509 (citing cases).

Defendants can arguably prevent a plaintiff from

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[16] The late Chief Justice's concurrence notes the arguments of two *amici* therein that two cases *Williamson County* cites – *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 2862 (1984) and *Parratt v. Taylor*, 451 U.S. 527 (1981) – provide[] limited support" for the state-litigation rule. 545 U.S. at 349 n.1, 125 S. Ct. at 2508.

Length limitations prevent an extended discussion of that point in this Petition. However, one thing seems clear: *Williamson County* was wrong in stating that *Monsanto* "held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." *Williamson County*, 473 U.S. at 195. Simply as a matter of facial logic, this cannot be. For, it is the Tucker Act that provides the judicial remedy for a claimant to sue the Federal Government in the U.S. Court of Claims for an alleged taking. Thus, it is a tautology to describe *Monsanto* as saying that a claimant must pursue all remedies under the Tucker Act before suing under the Tucker Act. But that is what *Williamson County* says, a mischaracterization that at least facially undercuts the force of *Williamson County*'s state-litigation requirement.

asserting a § 1983 federal takings claim in state court – As the late Chief Justice's *San Remo* concurrence noted, some state courts "themselves apply the state-litigation requirement from *Williamson County*" and refuse to entertain a federal takings claim until all state law compensation has been denied. 545 U.S. at 351 n.2, 125 S. Ct. at 2509. Indeed, the Illinois Supreme Court has adopted *Williamson County*'s ripeness rule in that context. *Beneficial Dev. Corp. v. City of Highland Park*, 161 Ill. 2d 321, 328, 641 N.E.2d 435, 438 (1994). Hence, petitioners herein did not advance a § 1983 takings claim in their state court action because it was not ripe there either.

It seems no answer (as the Opinion for the Court in *San Remo* says) that *Williamson County* "does not preclude" state courts' consideration of a claimant's Fifth Amendment Just Compensation claim simultaneously with, and in the alternative, to a state law claim. *San Remo*, 545 U.S. at 346, 125 S. Ct. at 2506. As the Chief Justice pointed out, that is so only if ripeness is prudential rather than constitutional, the considerably difficult problem discussed above, Argument, *supra*, pp. 21-24, that neither *Williamson County* nor *San Remo* answers. 545 U.S. at 351 n.2, 125 S. Ct. at 2509. In any event, on the grounds of failure to exhaust state remedies, state courts are still refusing to hear § 1983 claims appended to state court cases. *See, e.g., Leeper Elec. Servs. v. City of Carmel*, 847 N.E.2d 227 (Ind. App. 2006); *but see City of Marion v. Howard*, 832 N.E.2d 528, 533 (Ind. App. 2005).

In another curious twist, however, the resolution of that problem is beside the point because by invoking the removal jurisdiction of the federal court, a takings defendant can prevent a state court from considering such a federal claim in all events. It seems a fair reading of *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156 (1997), that if a compensation claimant includes a federal Fifth Amendment Just Compensation claim in his or her state court case, a state court takings defendant can

remove that case to federal court under 28 U.S.C. § 1441. Once there, it is obvious that a defendant can obtain both a dismissal of the federal takings claim for lack of ripeness, and remand of the rest of the case back to state court. This is the necessary result of the interaction of *Int'l College of Surgeons* removal rule with *Williamson County's* ripeness rule.

And, this is no theoretical exercise. In *Key Outdoor, Inc. v. City of Galesburg,* 327 F.3d 549 (7th Cir. 2003), the defendant City removed such a state court case that advanced a federal and state takings claims. The Seventh Circuit ruled that once removed the federal claim was properly dismissed as unripe, and that the state law compensation claim should be remanded to the state court.[17]

It is difficult to understand why a defendant can remove to federal court an unripe federal claim that a plaintiff could not file in federal court in the first instance. But, more seriously, this difference in treatment gives takings defendants a relatively

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[17] Equally as puzzling is the possibility that a state court will consider only a federal takings claim without reference to what compensation state law might provide or whether state law remedies had been exhausted. This is precisely what happened in *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991) (Hartwell, J., dissenting) ("Having determined that [there was] a taking under the Constitution of the United States, it is not necessary to examine whether it constitutes a taking under the South Carolina Constitution."), *rev'd on other grounds*, 505 U.S. 1003 (1992). This further reveals the frailty in the logic of both the state-litigation rule and *San Remo's* suggestion that nothing prevents a state court from hearing a federal takings claim along with state law claims. In fact, it seems a state court can simply ignore any state law claim and instead proceed to decide the § 1983 federal takings claim that *Williamson County* says is not ripe for decision. Thus, *Williamson County*'s state-litigation rule, pointless in reasoning, is pointless as well in effect.

easy way to prevent a state court from considering a federal takings claim at all. This is yet another *Williamson County* anomaly.

In finding the challenge in *Williamson County* to be premature, this Court somewhat cryptically noted that the landowner had "not shown that the inverse condemnation procedure [was] unavailable or inadequate." 473 U.S. at 196-197. The Seventh Circuit has characterized this as a "limited exception to its exhaustion requirement based on the futility of seeking state court relief." *Daniels v. The Area Plan Commission of Allen County,* 306 F.3d 445, 456 (7th Cir. 2002). Other Circuits have recognized this rule as well. *DLX, Inc. v. Kentucky*, 381 F.3d 511, 525 (6th Cir. 2004); *Pascoag Reservoir & Dam, LLC v. Rhode Island,* 337 F.3d 87, 92 (1st Cir. 2003); *Del Monte Dunes v. Monterey*, 920 F.2d 1496, 1501 (9th Cir. 1990); *Manufactured Home Cmtys., Inc. v. City of San Jose*, 420 F.3d 1022, 1035 (9th Cir. 2005); and *Naegele Outdoor Advertising v. Durham*, 844 F.2d 172, 175 (4th Cir. 1988). *See also Fourth Quarter Props. IV v. City of Concord*, 127 Fed. Appx. 648, 651 (4th Cir. 2005).

2. Once the Federal Courts Accept Illinois Law, As They Are Required To Do, It Is Clear That Further Resort To The Illinois Courts Would Be Futile.

The district court and Seventh Circuit simply refused to accept long-standing Illinois law that inverse condemnation under the Illinois Constitution and Illinois condemnation statute is only triggered by permanent flooding. This was error.

At bottom, petitioners' state law inverse condemnation claim required the interpretation and application of the Just Compensation Clause of the Illinois Constitution, Illinois Const. Art. I, § 15, which was the central focus of the controlling Illinois decisions. *People ex rel. Pratt v. Rosenfield*,

399 Ill. 247, 251, 77 N.E.2d 697 (1948), and *Luperini v. County of Du Page*, 265 Ill. App. 3d 84, 637 N.E.2d 1264 (2d Dist. 1994).

The district court's and Seventh Circuit's refusal to follow these controlling state law decisions clearly announcing rules of Illinois state constitutional and statutory law simply does not comport with the requirement that the lower federal courts must follow state law as announced by the state courts. 28 U.S.C. § 1652 (Rule of Decision Act). The decisions of higher and intermediate state courts are definitive on such matters of state law even if the federal court thinks they are wrong. *West v. AT&T*, 311 U.S. 223, 237 (1940); *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) (a federal court cannot construe a state statute differently than the highest court of the state). *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

In fact, Illinois law absolutely bars petitioners from pursuing inverse condemnation. This is the classic case of futility – petitioners should not be forced to pursue a remedy that is unavailable as a matter of clearly announced state law. This Court should so rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JUNE 2007

APPENDIX A

United States Court of Appeals
For the Seventh Circuit

No. 06-1286

SHIRLEY A. ROCKSTEAD and CAROL J. HENDERSON,

Plaintiffs-Appellants,

v.

CITY OF CRYSTAL LAKE,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 05 C 4485–**James B. Moran**, *Judge.*

ARGUED OCTOBER 31, 2006–DECIDED OCTOBER 31, 2006*
OPINION APRIL 10, 2007

Before POSNER, WOOD, and EVANS, *Circuit Judges.*

POSNER, *Circuit Judge*. The Constitution does not

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* With a notation that an opinion would follow.

forbid government to take private property for public use; it merely requires that, if it does so, it pay the owner just compensation. Therefore the Constitution is not violated until the government refuses to compensate the owner. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-95 and n. 13 (1985). When, as alleged in this case, the government (a town in Illinois) takes the property without a condemnation proceeding, the owner must, if the government refuses to pay, file a suit in state court–what is called an "inverse condemnation" suit–to obtain the compensation due him, and he must exhaust his state judicial remedies, if necessary by appealing an adverse decision. *Daniels v. Area Plan Commission*, 306 F.3d 445, 454-55 (7th Cir. 2002). He must proceed in that way because unless and until the state courts turn him down, his right to just compensation has not been infringed. *Gamble v. Eau Claire County*, 5 F.3d 285, 285-86 (7th Cir. 1993).

The plaintiffs started down that path, but before completing their state-court proceeding (which remains pending) filed the present suit, in federal court, seeking just compensation under federal constitutional law. They justify this short-circuiting of the state courts on the ground that state law is so clearly against them that it would be futile to proceed to final judgment in those courts. The district court disagreed and granted the town's motion to dismiss.

The plaintiffs own a parcel of land that on its west side is adjacent to a railroad right of way and on its north

side to storm-water detention ponds and a waste water treatment facility; the ponds and the treatment facility are owned by Crystal Lake. The plaintiffs' land drained through a ditch in the railroad right of way until the town installed a pipeline in the ditch at an angle that cut off the plaintiffs' drainage, resulting in intermittent but recurring flooding of their land from the ponds that transformed it from productive farmland into worthless wetlands. It is the resulting impairment of the value of their land that the plaintiffs claim is a taking entitling them to just compensation.

They argue that under Illinois law, as authoritatively declared in *People ex rel. Pratt v. Rosenfield*, 77 N.E.2d 697, 699-700 (Ill. 1948), it is plain that a suit for inverse condemnation ("inverse" because brought by the landowner, complaining of the taking, rather than brought by the condemnor to obtain title to the land) will not lie for damage caused by intermittent flooding, whatever the consequences of the flooding. And so the state trial court ruled in the pending state court litigation, before the plaintiffs, contending that the intermittent flooding of their property resulted in a taking as a matter of federal constitutional law, turned to federal court. The state judge's ruling was interlocutory because other claims and parties remain in the state litigation, but the plaintiffs could have sought the judge's leave to appeal the ruling under Illinois's counterpart to Fed. R. Civ. P. 54(b). See Ill. S. Ct. R. 304(a); *In re Marriage of Lentz*, 403 N.E.2d 1036, 1039 (Ill. 1980). They still can obtain appellate review of the ruling, when the state litigation concludes. But they say

there's no point in continuing in state court because the outcome is foreordained by state law.

If a state statute or constitutional provision provided that inverse condemnation was inapplicable to an impairment of land values that was due to intermittent flooding, recourse to state remedies would indeed be pointless and would therefore not be required. *Williamson County Regional Planning Commission v. Hamilton Bank*, *supra*, 473 U.S. at 197; *Daniels v. Area Plan Commission*, *supra*, 306 F.3d at 456-58. But the situation is different when as in this case the obstacle to the remedy is a state common law doctrine. *SGB Financial Services, Inc. v. Consolidated City of Indianapolis*, 235 F.3d 1036, 1037-39 (7th Cir. 2000); *Samaad v. City of Dallas*, 940 F.2d 925, 934 (5th Cir. 1991); *Austin v. City & County of Honolulu*, 840 F.2d 678, 680-81 (9th Cir. 1988). Judges do not make statutes or constitutions and cannot change them, but they do make, and they can–and do–change, common law doctrines. Such doctrines (such as the intermittent-flooding doctrine of the *Pratt* decision) tend, moreover, to be flexible in application. The "black letter" rules that restaters and treatise writers derive from common law decisions are usually standards rather than hard-and-fast rules–generalizations that yield to the particulars of the individual case. Holmes went too far when he stated without qualification that "general propositions do not decide concrete cases," *Lochner v. New York*, 198 U.S. 45, 76 (1905) (dissenting opinion), but one sees what he was driving at. So when a question of the meaning or application of a state common law doctrine is at issue,

"instead of asking a federal judge to guess what a state court is likely to do, why not ask the state court?" *SGB Financial Services, Inc. v. Consolidated City of Indianapolis*, *supra*, 235 F.3d at 1038.

The Illinois cases that hold that intermittent flooding does not create the sort of damage for which compensation is required rest on the common sense view that ordinarily such flooding does not do permanent damage. Illustrative is *Luperini v. County of Du Page*, 637 N.E.2d 1264, 1269 (Ill. App. 1994), where we read that "the evidence did not establish that plaintiffs were prevented from the use of their premises because of permanent accumulations of water." Many of us have had our basements flooded from time to time but we do not expect such incidents to cause a permanent reduction in the value of the house. Flood waters recede and the flooded buildings or land normally recover their previous value.

But the situation has changed with the rise of severe legal restrictions (especially those imposed by the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*) on the use that a property owner may make of land declared to be wetlands. E.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 621 (2001); *Rapanos v. United States*, 126 S. Ct. 2208, 2225-27 (2006) (plurality opinion); *Kelly v. EPA*, 203 F.3d 519, 520-22 (7th Cir. 2000); *Hoffman Homes, Inc. v. Administrator*, 999 F.2d 256, 258 (7th Cir. 1993); *Smith v. City of Clearwater*, 383 So. 2d 681, 684-85 (Fla. App. 1980). Such a declaration, while good news for certain birds and other types of animal and for the health of the environment

in general, is bad news for the owner of the property, who may find himself forbidden to build improvements on it or otherwise put it to what the market would consider a productive use. E.g., *Bayou Des Familles Development Corp. v. United States*, 130 F.3d 1034, 1039-40 (Fed. Cir. 1997); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1180-82 (Fed. Cir. 1994). Intermittent flooding the cumulative effect of which is to transform an owner's property into permanent wetlands is hard to distinguish from permanent flooding that puts the land permanently underwater. Soggy and submerged are not synonyms but in the modern era of wetlands protection may have the same effect on property values.

We see a glimmering of recognition of this point in *Luperini v. County of DuPage, supra*. The case involved the same kind of intermittent flooding as this case–flooding due to the county's having installed a storm sewer on property adjacent to the plaintiffs' property that diverted water onto their property. In ruling against the plaintiffs in their inverse condemnation suit on the ground that "where the public improvement [the storm sewer] causes only temporary accumulations of water on the subject property, a taking has not occurred," the court noted evidence that "the plaintiffs' property had been subject to occasional flooding prior to the storm sewer being installed and that an undefined portion of the property was previously classified as jurisdictional wetlands." 637 N.E.2d at 1268. The implication is that if the flooding *created* "jurisdictional wetlands," this might be deemed a taking under Illinois law. There was also

evidence that despite the intermittent flooding the plaintiffs could continue to use the property as they had been doing, albeit at a higher cost; and there was also evidence that they might be able to eliminate the problem created by the storm sewer by installing a covered conduit conveyance system. *Id.* at 1269. All this evidence may just have been icing on the cake, but the court's recital of it suggests that had the evidence been more favorable to the plaintiffs they might have won.

The Supreme Court of Illinois has not weighed in on the issue since the *Pratt* case in 1948, more than half a century ago. It is premature to conclude that if faced with a case such as this it would deny relief on the basis of a mechanical application of the "temporary accumulations" doctrine.

For us to rule otherwise would actually do a disfavor to property owners such as these plaintiffs, who, in order to bring the case within a "futility" exception find themselves arguing against themselves, as when they say in their brief: "The matter is not remotely debatable. The Owners have no remedy under Illinois inverse condemnation law." The first sentence is definitely wrong, and the second sentence may well be wrong. But when the plaintiffs, disappointed in this court, resume the litigation in the state court, they will find those sentences quoted against them by their adversaries.

A "futility" exception broad enough to embrace this case not only would induce owners to shoot themselves in

the foot, but would reflect an exaggerated conception of the rigidity of common law doctrines, make the right to sue in federal court depend on uncertain predictions about what state courts would do in a similar case, and curtail the evolution of state common law by keeping cases that challenge the existing doctrine out of state court where they could influence the law.

We did say in the *SGB* case that "in principle one could imagine a precedent with the same effect as the lack of an inverse-condemnation law. Suppose, for example, the Supreme Court of Indiana had held that regulatory takings as a class are never compensable under the state's inverse-condemnation law." *SGB Financial Services, Inc. v. Consolidated City of Indianapolis, supra*, 235 F.3d at 1039; see also *Bateson v. Geisse*, 857 F.2d 1300, 1306 (9th Cir. 1988); *Austin v. City & County of Honolulu, supra*, 840 F.2d at 680-81. We have found only one case to fit *SGB*'s example–*Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1506-07 (9th Cir. 1990), which allowed a landowner to bypass the state courts because the state's highest court had held that landowners could not seek compensation for a regulatory taking through inverse condemnation proceedings (or otherwise). *Agins v. City of Tiburon*, 598 P.2d 25 (Cal. 1979). But ours is not such a case; it is a case in which state law is uncertain because of the antiquity of the ruling state supreme court decision, and the intervening change in the legal status of wetlands. Recall the intimation in *Luperini* that flooding that creates "jurisdictional" (legally protected) wetlands might be deemed a compensable

taking under Illinois law.

So the plaintiffs' federal case was rightly dismissed, and that raises the question of what will happen to their federal claim pressed futilely on us. In state court they were seeking relief under Illinois state law, not, so far as we are aware, under the federal Constitution. Although the *Williamson* line of cases that requires the property owner to seek compensation in the state courts speaks in terms of "exhaustion" of remedies, that is a misnomer. For if, as the present plaintiffs will have to do, the property owner goes through the entire state proceeding, and he loses, he cannot maintain a federal suit. The failure to complain of the taking under federal as well as state law is a case of "splitting" a claim, thus barring by virtue of the doctrine of res judicata a subsequent suit under federal law. For the general principle, see *Torcasso v. Standard Outdoor Sales, Inc.*, 626 N.E.2d 225, 228-29 (Ill. 1993), and *People ex rel. Burris v. Progressive Land Developers, Inc.*, 602 N.E.2d 820, 824-25 (Ill. 1992), and for its application to cases such as this see *American Nat'l Bank & Trust Co. v. City of Chicago*, 636 F. Supp. 374, 378-80, 384 (N.D. Ill. 1986) (Illinois law); *Wilkinson v. Pitkin County Board of County Commissioners*, 142 F.3d 1319, 1322-25 (10th Cir. 1998) (per curiam); *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 364-65 (9th Cir. 1993). The litigation in state court is the end of the road, see 28 U.S.C. § 1738, unless the state itself allows relitigation of the constitutional question. *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 341-48 (2005).

It is unclear whether the plaintiffs have even raised their federal claim in the pending state court proceeding. (They have not pressed it.) If they have not done so but still can, they would be well advised to do so.

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals
For the Seventh Circuit

April 10, 2007
Before
Hon. Richard A. Posner, *Circuit Judge*
Hon. Diane P. Wood, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

No. 06-1286
SHIRLEY A. ROCKSTEAD and CAROL J. HENDERSON,
Plaintiffs-Appellants,

v.

CITY OF CRYSTAL LAKE,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 05 C 4485–**James B. Moran**, *Judge.*

JUDGMENT - WITH ORAL ARGUMENT

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

United States Court of Appeals
For the Seventh Circuit

October 31, 2006
Before
Hon. Richard A. Posner, *Circuit Judge*
Hon. Diane P. Wood, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

No. 06-1286

SHIRLEY A. ROCKSTEAD and CAROL J. HENDERSON, *Plaintiffs-Appellants*,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
v.	
CITY OF CRYSTAL LAKE, a municipal corporation, *Defendant-Appellee.*	No. 05 C 4485
	James B. Moran, *Judge.*

ORDER

The judgment is AFFIRMED, opinion to follow.

APPENDIX B

United States District Court,
Northern District of Illinois,
Eastern Division

No. 05 C 4485

SHIRLEY A. ROCKSTEAD and CAROL J. HENDERSON,
Plaintiffs-Appellants,

v.

CITY OF CRYSTAL LAKE, a municipal corporation,
Defendant-Appellee.

December 29, 2005

MEMORANDUM OPINION AND ORDER

MORAN, *Senior Judge.* Plaintiffs Shirley Rockstead and Carol Henderson brought this action against defendant City of Crystal Lake, alleging that defendant took their property without providing compensation, when it constructed various structures and facilities that created

flooding conditions on plaintiffs' property. Invoking the "takings clause" of the Fifth Amendment of the U.S. Constitution, plaintiffs seek just compensation. Defendant now moves to dismiss the action under Fed. R. Civ. P. 12(b)(6). For the following reasons, defendant's motion is granted.

BACKGROUND

The following facts are taken from plaintiffs' complaint. Plaintiffs' property is located in McHenry County, Illinois, and is partially contiguous to property owned by defendant. The natural drainage on plaintiffs' property was obstructed after defendant constructed culverts, pipelines, flood control and sanitary treatment facilities on the portion of its property that is adjacent to plaintiffs' property. As a result of defendant's additions, plaintiffs claim that water now drains toward, instead of away from, their land (cplt. at ¶¶ 11, 21). Plaintiffs claim that that land, which was previously cultivatable and used as productive farmland, has been reduced to useless wetlands (*id.* at ¶¶ 3, 16).

In 1994 plaintiffs filed an action seeking damages and equitable relief against defendant. *See Rockstead, et al. v. City of Crystal Lake*, No. 96 CH 297. This action has languished in state court for over a decade now, during which time plaintiffs have failed to recover damages or compensation. On July 14, 2004, the circuit court in McHenry County ruled that immunity shielded defendant

from damages. Then, on July 27, 2005, the circuit court held that plaintiffs' claim for inverse condemnation failed because they failed to show that their land was actually taken under Illinois law. This latter decision did not end plaintiffs' action in state court, as the circuit court found "a genuine issue of material fact as to the timeliness of the cause of action" (def. ex. B at 7). Less than two weeks after the circuit court denied plaintiffs compensation, plaintiffs filed a complaint in federal court. In their federal complaint, they claim that they have exhausted their state remedies and further action in state court would be futile. Subsequent to filing that complaint, plaintiffs and defendant settled a condemnation action brought by defendant in state court.

Defendant argues that the action is not ripe for federal review because plaintiffs failed to exhaust their state remedies. Defendant alternatively argues that even if the case is ripe for review, abstention is proper due to the ongoing state proceedings. Lastly, defendant contends that transfer of venue to the district court in the Western Division of the Northern District of Illinois is proper. Plaintiffs riposte that the case is ripe because appealing the circuit court's order is futile. They further contend that their inability to obtain relief in state court renders abstention improper, and that their federal action does not otherwise conflict with the ongoing state action. Plaintiffs also find the Eastern Division to be the most convenient

forum.

DISCUSSION

Prior to assessing the parties' arguments, we address several issues surrounding the proper standard of review. Defendant brings its motion to dismiss under Rule 12(b)(6), and it thus challenges the sufficiency of the complaint, not the underlying merits of plaintiffs' action. *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990). But by claiming that the case is not ripe for adjudication under the special ripeness rules that apply to "takings claims," defendant essentially argues the court lacks subject matter jurisdiction. *See Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 957-58 (7th Cir. 2004). Thus, the motion should have been brought pursuant to Rule 12(b)(1).

While a Rule 12(b)(6) motion challenges the sufficiency of the complaint and is generally limited to the four corners of the complaint, with limited exceptions (*Thompson v. Illinois Department of Professional Regulation*, 300 F.3d 750, 753 (7th Cir. 2002); *Venture Associates Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 431 (7th Cir. 1993)), under Rule 12(b)(1) a court "look[s] behind the plaintiff's allegations and make[s] factual findings for purposes of assessing its subject matter jurisdiction" (*Palay v. United States*, 349 F.3d 418, 424 (7th Cir. 2003); *see also Long v. Shorebank Dev. Corp.*,

182 F.3d 548, 554 (7th Cir. 1999)). Documents external to the complaint are central to this motion. Not all of those documents are referred to in the complaint. Defendant does not challenge the allegations of jurisdiction in the complaint, and instead focuses on the truth of the facts alleged, specifically plaintiffs' claims of futility. *See Royal Towing, Inc. v. City of Harvey*, 350 F. Supp. 2d 750, 752 (N.D. Ill. 2004).

We choose to proceed under Rule 12(b)(1), even though defendant failed to invoke that rule. Doing so is faithful to our obligation to police subject matter jurisdiction. *See Cook v. Winfrey*, 141 F.3d 322, 325 (7th Cir. 1998). Under Rule 12(b)(1), we accept as true all well-pleaded factual allegations and draw reasonable inferences in favor of plaintiffs. *Capitol Leasing Co. v. FDIC*, 999 F.2d 188, 191 (7th Cir. 1993).

Generally, a plaintiff need not exhaust judicial remedies as a precondition to bringing a federal civil rights suit. *Gamble v. Eau Claire County*, 5 F.3d 285, 288 (7th Cir. 1993) (citing *Patsy v. Board of Regents*, 457 U.S. 496, 500 (1982)). However, in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), the Supreme Court established "special ripeness standards for constitutional property rights claims." *Patel v. City of Chicago*, 383 F.3d 569, 570 (2004). The two-pronged *Williamson County* ripeness standard requires that

"plaintiff must demonstrate that he or she received a 'final decision' from the relevant government entity" and "the plaintiff must have sought 'compensation through the procedures the State has provided for doing so.'" *Forseth v. Village of Sussex*, 199 F.3d 363, 372 (7th Cir. 2000) (quoting *Williamson*, 473 U.S. at 186-87, 194). The first prong has been dubbed the "final decision requirement," and the second, the "exhaustion requirement." *Id.* Because this case involves a physical, as opposed to regulatory taking,[1] the final decision requirement has been met. *See id.* at 372 n.12 (physical invasion constitutes a "final decision"); *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 91 (1st Cir. 2003). The "streamlined inquiry" focuses on *Williamson County's* exhaustion requirement. *Greenfield Mills*, 361 F.3d at 958.

The exhaustion requirement generally refers "to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." *Williamson County*, 473 U.S. at 193. The Court forged an exception to the exhaustion requirement when it noted that a plaintiff may be excused from

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[1] *Williamson County* focused on a regulatory taking, but the ripeness rules announced therein have been extended to physical takings. *See Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 380 (2d Cir. 1995); *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997); *Arnett v. Myers*, 281 F.3d 552, 563 (6th Cir. 2002).

exhausting available state procedures if he demonstrates that such procedures are "unavailable or inadequate." *Id.* at 197. Thus, a plaintiff need not first resort to state procedures if doing so would be futile. *Daniels v. Area Plan Commission*, 306 F.3d 445, 456 (7th Cir. 2002). Plaintiffs claim that they are excused from exhausting their state remedies by appealing the circuit court's decision because the remedy they seek is unavailable under Illinois law and an appeal would be futile. But first we must inquire whether an appeal is ordinarily required.

Both parties appear to assume that seeking appellate review is necessary to exhaust state remedies. In the vast majority of cases dismissed for failing to satisfy the exhaustion requirement, the plaintiff bypasses all state court opportunities for compensation. *See, e.g., Forseth, supra; Gamble, supra; Hager v. City of W. Peoria*, 84 F.3d 865, 869 (7th Cir. 1996); *Kennedy v. Village of Oak Lawn*, 2000 U.S. Dist. LEXIS 16783; *Popp v. City of Aurora*, 2000 U.S. Dist. LEXIS 5708; *Ostergren v. Village of Oak Lawn*, 125 F. Supp. 2d 312 (N.D. Ill. 2000); *Vigilante v. Village of Wilmette*, 88 F. Supp. 2d 888 (N.D. Ill. 2000). In contrast, plaintiffs have actually sought compensation in state court, and the state court dismissed their claim.

In *Williamson County*, the Court observed that "no constitutional violation occurs until just compensation has been denied," which therefore obligates the "property

owner [to] utilize procedures for obtaining compensation before bringing a § 1983 action." *Williamson County*, 473 U.S. at 194 n.13. Illinois law provides for inverse condemnation actions, which allow a landowner to recover compensation for a taking of his property in the absence of condemnation proceedings. *Lamar Whiteco Outdoor Corp. v. City of Chicago*, 355 Ill. App. 3d 352, 823 N.E.2d 610, 622, 291 Ill. Dec. 318 (Ill. App. 2d Dist. 2005). Section 735 ILCS 5/7-101 establishes the procedures for recovering compensation for the taking of property. Section 5/7-101 specifically focuses on trial procedures when it requires compensation to be ascertained by a jury, unless waived. The statute contains no provisions specifying necessary appellate procedures. Neither party claims that the circuit court's summary judgment order is non-appealable. Defendant cites IL Sup. Ct. R. 301, which states that "an appeal in a continuation of the proceeding," but this does not indicate that *Williamson County* compels mandatory appeals. To the contrary, a case is ripe after compensation has been sought and denied after utilizing "available avenues of state judicial review." *Wisconsin Cent. Ltd. v. Public Service Com'n of Wisconsin*, 95 F.3d 1359, 1369 (7th Cir. 1996).

We conclude that because appellate review is an available avenue of state judicial review, a plaintiff does not satisfy the exhaustion requirement until such review is sought. The word "available" often precedes "review" or

"remedies" in the cases. *See, e.g., SGB Fin. Servs. v. Consolidated City of Indianapolis-Marion County*, 235 F.3d 1036, 1037 (7th Cir. 2000); *Sprint Spectrum L.P. v. City of Carmel*, 361 F.3d 998, 1003-04 (7th Cir. 2004). Requiring all "available" resources to be used strongly suggests that a plaintiff has not exhausted state remedies after losing at the trial level. Further, permitting plaintiffs to seek federal review prior to pursuing state appellate review short-circuits *Williamson County's* exhaustion requirement and would allow a litigant who prefers federal court to obtain an adverse judgment in state court posthaste. Such a ruling could also provide incentives for litigants to withhold arguments in order to avoid the effect of *res judicata* in federal court. Moreover, if the appellate court were to rule in plaintiffs' favor, there would be no case or controversy for this court to adjudicate. *See, Sprint Spectrum*, 361 F.3d at 1004. The message of *Williamson County* is that in takings cases, litigants must avail themselves to state procedures, except if those procedures are unavailable or inadequate. We turn now to the parties' arguments concerning the futility of appellate review.

According to plaintiffs, an appeal of the circuit court's ruling would be futile because under Illinois law land is not taken when it is only subjected to intermittent, as opposed to permanent flooding. Plaintiffs concede that defendant's construction projects have caused only intermittent flooding, and thus claim that they will never

recover under state law. In response, defendant states that inverse condemnation proceedings are adequate and available, and *Williamson County's* exhaustion prong requires that plaintiffs appeal, despite their predictions of sure defeat.

In Daniels, the plaintiff sought an injunction in federal court prior to first seeking relief in state court. The court excused the plaintiff from exhausting state court remedies because the plaintiff could only obtain monetary damages through the state inverse condemnation proceedings. It would have been futile for the plaintiff to seek injunctive relief in state court when that remedy was unavailable. *Daniels*, 306 F.3d at 456. Unlike the scenario depicted in *Daniels*, no state statute precludes plaintiffs from recovering for the alleged taking. Plaintiffs only claim that they cannot obtain damages due to adverse case law. In *Daniels*, for the plaintiff to obtain injunctive relief in state court would have required the judicial nullification of a legislative act. Here, plaintiffs need only seek to distinguish prior case law. The futility analysis often focuses on the inadequacy or availability of procedures, and plaintiffs do not identify any procedures from the inverse condemnation proceeding that are inadequate. *See Harbours Pointe of Nashotah, LLC v. Village of Nashotah*, 278 F.3d 701, 704 (7th Cir. 2002) ("If a state provides adequate procedures for seeking just compensation, a property owner cannot state a claim under federal law until

he has used those procedures and been denied compensation."). Plaintiffs are not barred from arguing that they are entitled to compensation.

As the plaintiffs argue here, in *SGB*, *supra,* the plaintiff argued that, based on prior state court decisions, the state courts would not entertain the argument it intended to make, and that pursuing a state court action was consequently futile. The court rejected that argument and held that the *Williamson County* exhaustion requirement does not turn on a plaintiff's expectation of success. *SGB*, 235 F.3d at 1038 ("State remedies do not become unavailable just because resort to them may fail."). Plaintiffs argue that *SGB* is distinguishable because the plaintiff there completely bypassed state court, whereas plaintiffs say their fruitless state court litigation supports their declaration of futility. The logic of *SGB*, however, would not permit a plaintiff who lost in state court, at the trial level, to take his case to federal court; it noted that plaintiffs cannot declare state remedies "futile ex ante, without ever being tried." *Id.* As discussed above, we believe exhaustion of remedies requires appealing an adverse trial court decision. We would have a different case if the circuit court's summary judgment ruling involved the application of a statutory rule in a manner that is not open to dispute. But the circuit court's ruling turned on interpretation of facts and law, and that decision is not a bar that "would block all consideration of a claim." *Id.* at

1039.

On appeal, plaintiffs could argue that the cases that the circuit court relied on do not set forth a "permanent standing water" requirement, as the circuit court concluded (*see* def. ex. B at 7). Plaintiffs could contend that when cultivatable land is transformed into land that is "permanently wet enough to be designated wetlands" (def. ex. B at 7), the water "permanently inundates" in a manner that has been held to be "a physical invasion tantamount to a taking." *Luperini v. County of DuPage*, 265 Ill. App. 3d 84, 637 N.E.2d 1264, 1268, 202 Ill. Dec. 528 (Ill. App. 2d Dist. 1994). *Luperini* was the primary focus of the circuit court's analysis. Indeed, the circuit court only cited *Luperini* and one other case on which *Luperini* relied.

The land in *Luperini* was subjected to intermittent flooding after an adjacent construction project; however, prior to the completion of that project portions of the land experienced flooding, and the court identified a cause independent of the construction project that contributed to the flooding. Here, the limited record shows that plaintiffs' land was cultivatable, but now is classifiable as wetlands.

Also, the record does not disclose an alternate source of flooding. A takings analysis involving flooding is ultimately a question of degree (*Winnebago County v. Kennedy*, 60 Ill. App. 2d 408, 208 N.E.2d 612 (Ill. App. 2d

Dist. 1968)), not an inflexible doctrine that precludes all review once it is discovered that the subject land is not lost under several feet of water.

We offer these observations not to cast doubt on the circuit court's decision (the evaluation of which is for the Illinois Appellate Court), but, instead, to illustrate why we disagree with plaintiffs' declaration of futility. The appellate court has discretion to find that a taking has occurred, and *Luperini* does not indicate that the appellate court has "dug in its heels" and made clear that it would reject plaintiffs' claim. *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 3[4]2, 349 (2d Cir. 2005). There is thus a state court to hear plaintiffs' arguments, and that plaintiffs may lose on the merits is "neither here nor there." *Id.* at 1039; *see also Greenfield Mills*, 361 F.3d at 958; *Unity Ventures v. County of Lake*, 841 F.2d 770, 776 (7th Cir. 1988). This case is not ripe because if the appellate court decided that a compensable taking occurred, then there would be no basis for relief under section 1983, and no case or controversy. *SGB*, 235 F.3d at 1038.

We observe that plaintiffs may raise their federal claims in state court. It is not clear whether they have actually done so. The Supreme Court recently reaffirmed the ability of state courts to entertain federal constitutional claims in *San Remo Hotel v. County of San Francisco*, 125 S. Ct. 2491, 2506 (2005). In *San Remo*, the Court held that

in takings cases that are first raised in state court under *Williamson County*, federal courts must afford state court decisions full faith and credit under 28 U.S.C. § 1738. A party cannot avoid the full faith and credit clause by reserving federal claims for litigation in federal court. The *San Remo* decision affirms that despite the preclusive effect that a state court decision may have on a future federal case,[2] plaintiffs must still first seek compensation in state courts. In addition to the full faith and credit clause, the Rooker-Feldman doctrine may also block a federal claim. *See San Remo*, 125 S. Ct. at 2509 (Rehnquist, C.J., concurring); *Zealy v. City of Waukesha*, 153 F. Supp. 2d 970, 980 (E.D. Wis. 2001). Again, it is not clear whether plaintiffs raised their federal claims in state court, but in light of *San Remo*, failing to raise those claims may preclude future consideration in federal court. We offer these points here only because they appear central to this case, and they were absent in the parties' memoranda.

In sum, plaintiffs' case is not ripe for federal review because plaintiffs have not satisfied *Williamson County's* exhaustion requirement. Having found the case is not ripe,

---

[2] This catch-22 has been described as the "*Williamson* trap." *See DLX, Inc. v. Kentucky*, 381 F.3d 511, 518 n.3 (6th Cir. 2004); Madeline J. Meacham, *The* Williamson *Trap*, 32 Urb. Law. 239 (2000).

we do not reach the abstention and venue arguments.

CONCLUSION

For the foregoing reasons, defendant's motion to dismiss is granted.

s/ James B. Moran
JAMES B. MORAN
Senior Judge, U.S. District Court

December 29, 2005.

United States District Court,
Northern District of Illinois,
Eastern Division
No. 05 C 4485

SHIRLEY A. ROCKSTEAD and CAROL J. HENDERSON,
Plaintiffs,

v.

CITY OF CRYSTAL LAKE, a municipal corporation,
Defendant.

JUDGMENT IN A CIVIL CASE

- ☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.
- ■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that defendant's motion to dismiss the action under Fed.R.Civ.P. 12(b)(6) is granted.

Michael W. Dobbins, Clerk of the Court
s/ Linda Garth, Deputy Clerk
Linda Garth

Date: 12/29/2005

APPENDIX C

Nineteenth Judicial Circuit Court, McHenry County, Illinois

No. 96 CH 297

SHIRLEY A. ROCKSTEAD and CAROL J. HENDERSON, *et al.*,
Plaintiffs,

v.

CITY OF CRYSTAL LAKE, a municipal corporation,
Defendants.

July 27, 2005

ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

This cause has been before the Court on the Motion of Defendants, City of Crystal Lake and Union Pacific Railroad, for Partial Summary Judgment as to Counts IV and V of Plaintiffs' Second Amended Complaint which seeks relief on the basis of inverse condemnation theory.

This litigation has a long and complicated history, but the position taken by the Defendant's in this current motion is quite simply stated on page 2 of the motion:

> "..., as a matter of law, Plaintiffs' inverse condemnation action fails as (1) the Plaintiffs can never establish the primary element of that form of relief - a permanent taking, and (2) that the action was untimely filed."

The Court has reviewed the Defendants' Motion for Partial Summary Judgment, Plaintiffs Response to said Motion and Defendants' Reply. The Court has also reviewed the other written materials submitted which, among other things, included statements of facts and counter statements of facts, deposition excerpts, affidavits, pleadings, court transcripts, discovery responses, photographs and a video tape. The Court has reviewed the citations to legal authorities. The Court has heard the oral arguments presented.

The Court will not recite the underlying facts of the case because the facts are well known to the parties and are not in serious dispute in the context of the present motion. The seemingly simple issue before the Court is whether or not the Plaintiffs have presented sufficient evidence in this case to prove an essential element of their claim - that the facts of this case establish that there has been a taking of

property without just compensation.

The issue in the Motion for Summary Judgment can be resolved by reference to the relatively recent Second Appellate District case of *Luperini vs. County of DuPage*, 265 Ill. App. 3d 84 (2nd Dist. 1994).

In *Luperini, supra*, the Plaintiffs-Property Owners brought a Complaint for Mandamus seeking to compel the institution of condemnation proceedings because the Defendants had installed a storm water sewer line on adjacent property that caused a diversion of run off water onto their property resulting in a physical invasion of their property which was tantamount to a constitutional taking. The facts of the *Luperini* case have certain similarities to the facts in the case now before this Court, but the circumstances are not totally the same.

In *Luperini, supra*, at pages 88-89, the Appellate Court summarized the facts of the case as follows:

> 'The facts material to this determination are not disputed. Sometime in either 1983 or 1987 a storm sewer pipe was installed near plaintiffs' property in order to alleviate occasional flooding of a housing subdivision to the south of the subject property. As a consequence of the storm sewer installation, storm water runoff was diverted onto and across

> plaintiffs' property, which resulted in flooding of plaintiffs' house, garage, and basement. Additionally, when it rains, the Sawmill Creek backs up causing flooding on plaintiffs' property.
>
> The flooding has caused a proliferation of wetland vegetation and an increase in size of the floodplain on plaintiff's property. There was no evidence, however, that the flooding caused a permanent accumulation of water on plaintiffs' property, and some evidence was presented to suggest that plaintiffs' property had been subject to occasional flooding prior to the storm sewer being installed and that an undefined portion of the property was previously classified as jurisdictional wetlands."

Further, in *Luperini, supra,* at page 89 the Appellate Court specifically discusses the analysis of takings involving inundation with water resulting from the construction of public improvements:

> 'Where an adjacent or abutting landowner is inundated with water resulting from the construction of a public improvement, the question of whether a taking has occurred turns on the temporal nature of the inundation. (See generally *Herget National Bank v. Kenney* (1985), 105 Ill. 2d 405; *Pratt*, 399 Ill. at 251) Where the public

improvement causes only temporary accumulations of water on the subject property, a taking has not occurred. (*Pratt*, 399 Ill. at 252.) In contrast, where water occasioned from the construction of a public improvement permanently inundates the subject property, it has been held that a physical invasion tantamount to a taking has occurred. *Herget*, 105 Ill. 2d at 410."

Further, in *Luperini*, *supra*, at page 90, the Appellate Court found in that case as follows:

"The undisputed facts of the present case are controlled by *Pratt*. Although the deposition excerpts attached to plaintiffs' response and motion allow for a reasonable inference that each time it rained their house, garage and basement were damaged because of flooding, there is no evidence that the accumulations of water were permanent. Furthermore, the evidence did not establish that plaintiffs were prevented from the use of their premises because of permanent accumulations of water. In his August 22 letter, plaintiffs' expert nowhere stated that plaintiffs were prevented from the use of their property resulting from permanent accumulations of water. Instead, he stated that "[t]he sustained length of time and increased rate of flow in the channels that cross the property will

> greatly increase the costs and difficulty involved in maximizing the productivity of the property." Furthermore, plaintiffs' expert expressed his view that the erosion and sediment accumulation in the Sawmill Creek and the water diversion resulting from the sewer pipe installation could be corrected through excavation and the provision of a covered conduit conveyance system, which would eliminate the conditions conducive to the formation of wetlands vegetation."

As mentioned in the previous quotation, the Appellate Court in *Luperini, supra*, at page 90 relied on the Illinois Supreme Court Decision in *People ex rel Pratt vs. Rosenfield*, 399 Ill. 247 (1948) as a precedent upon which to base its decision concerning what constitutes a physical taking of property. In *Pratt, supra*, at page 252, the Illinois Supreme Court stated:

> "As to whether the alleged damages are such as to amount to a physical taking of property, we note the allegations that surface waters run into the buildings and make them unfit for the uses to which they are now devoted and will damage or destroy valuable equipment, machinery and supplies therein; that it will be necessary to change the floor levels and that because of the materials of which the buildings are constructed the change of floor levels will require large expenditures of money. It

is not alleged that these waters accumulate and remain on the premises and thereby prevent the use thereof, but it is claimed that by reason of their running into the buildings the damages are occasioned. Running surface waters are not constantly present but are temporary and come as a result of rain or snow."

In summary, this Court believes Defendants position in this motion to be that Plaintiff cannot establish a permanent physical taking of its property because Plaintiffs cannot establish permanent surface water, either standing or running on the property, as required by the *Pratt* decision, *supra* and adopted by the Second District Appellate Court in *Luperini, supra*. The Plaintiffs concede and, in fact, state that it was never their contention, that Defendants have caused permanent standing water on their property.

The Plaintiffs claim that the actions of the Defendants have caused their property to be permanently inundated with water.

In an affidavit entitled "Supplemental Declaration of First E. John Schumacher", the Plaintiffs' expert witness, Mr. Schumacher states as follows:

"6. I have reexamined my report and the same

documentary material in preparation for an inspection of the property at issue in this case which I conducted on February 20, 2005.

7. At that time, I found that it is obvious that in the past five years that the hydrology has changed even more drastically over the intervening five years so that the ground remains permanently inundated with water, although to more or less degrees depending on the weather and other conditions.

8. It is my opinion, to a reasonable degree of engineering certainty, that the Geske property has been permanently altered so that it is permanently inundated with water, although to varying degrees, that the water accumulate and remain on the Geske property and in the soil, and that the wetlands present on the land are permanently and continually wet. The direct and immediate, though slowly manifesting, cause of this change is the gradual effect of the 1994 construction and modification of the City's holding ponds directly adjacent to the property which has altered the water table of the land surrounding the ponds,

including the Geske property, so that it is now continually saturated and inundated with water. This change has occurred since my original work in 1999 and Report in 2000."

In his deposition taken on May 16, 2005, E. John Schumacher at page 55 beginning on line 21 and through page 56 line 12, was asked these questions by Defendants attorney and gave these answers.

"Though there are periods when there is standing water and there are periods when there's not standing water, we don't know how frequently that the case that there's standing water versus non-standing water at least as you sit here today given the breadth of your assignment?

A. That's correct.

Q. But there's little doubt in your mind that the soils are wet enough to still permit for the designation of wetlands or –

A. That's my opinion.

Q. And that's not changed, there's continually – they're going to be permanently wet

enough to support the definition of wetlands?

A. Under the existing conditions, yes."

On page 57 of his deposition on lines 15 through 21, Schumacher was asked these questions by the attorney for the Plaintiffs and Schumacher gave these answers:

"Q. That the property has been permanently changed so it is continually wet; right?

A. Correct.

Q. And what you don't know is whether or not the water is standing on there all the time; right?

A. Correct."

Also, in the deposition of E. John Schumacher; beginning on page 32 at line 23 and ending on page 33 at line 20, the following questions by Defendants attorney and the following answers were given by Mr. Schumacher:

"Q. What is your definition of inundation, John? Is that a term of art or just a – in your

business or –

A. Just a general definition?

Q. Yeah.

A. Inundation is when the surface is covered with water.

Q. Does inundation tell us anything about the time period that the surface is covered with water, you know, just the term inundation as you use it in your work?

A. No. It's a simple condition.

Q. For example, unlike wetlands, we know something about the time period of a condition known as wetlands because you know it takes a long time to get to that point; right?

A. Yes.

Q. Okay. But the term in your business of inundation doesn't mean anything about – there's no temporal component to inundation, it's just a stated condition at a

time given?

A. That's correct."

Also in the deposition of E. John Schumacher beginning on page 39 line 7 through page 40 at line 8, the following questions were asked by the Defendants' attorney and the following answers were given by Mr. Schumacher:

"Q. So when you say that on the 27th of February '05 at around 8:00 a.m. there was a quarter to 3/16 inch of ice, you don't know one way or the other whether that ice or the water equivalent was present for any period of time thereafter? I mean, I'm going to say month, but you can't even tell me the next day; is that fair to say?

Mr. Gekas: Well, you asked him that now at least twice, but go ahead and answer it, John.

BY THE WITNESS :

A. No, there is no way of knowing.

BY MR. ANDREWS :

Q. So you don't know if that standing water –

evidence of standing water you saw on the half acre to an acre was temporary, sporadic, permanent or any other adverb you care to use, but you just know it was there that one day?

A. That's right.
Q. You don't know if it was permanent; correct?

A. That's correct."

Although in paragraph 7 of his Supplemental Declaration, Mr. Schumacher stated that the ground remains permanently inundated with water" and further on page 33 of his deposition Mr. Schumacher stated that "inundation is when the surface is covered with water", it is clear from reading the entirety of Mr. Schumacher's deposition testimony and his Supplemental Declaration and, frankly as conceded by the Plaintiffs, that the Plaintiffs evidence does not establish permanent standing water on their property caused by the public improvement in this case. Taken in the light most favorable to the Plaintiffs, the evidence establishes soils that are permanently wet enough to be designated wetlands and, that on occasion there is standing water on the property.

Although this Court believes it creates a harsh

result, it appears that the current state of the law in the State of Illinois requires that there must be evidence of permanent surface water on property caused by the public improvement before a finding can be made that a physical invasion tantamount to a taking has occurred. The Plaintiffs have not and cannot present such evidence in this case.

Based upon the foregoing, this Court finds that the Defendants Partial Motion for Summary Judgment as to Counts IV and V of the Second Amended Complaint should be granted on the basis that the Plaintiffs can never establish under the current law that there is a permanent taking.

As to the Defendants second point in the Motion for Partial Summary Judgment, the Court believes that there is a genuine issue of material fact as to the timeliness of the cause of action and the Court will not grant the Partial Motion for Summary Judgment on that basis.

THEREFORE, IT IS ORDERED:

1. Defendants Motion for Partial Summary Judgment as to Counts IV and V of the Second Amended Complaint is granted.

2. Judgment is entered on Count IV and V of

the Second Amended Complaint in favor of the Defendants and against the Plaintiffs.

3. The cause is continued for status on the remaining Counts to August 19, 2005 at 9:00 am. without further notice.

ENTERED July 27, 2005 ENTERED s/ Michael Sullivan

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause by depositing a copy thereof in the U.S. Mail, postage prepaid, in envelopes addressed to each of the attorneys of record herein at their respective addresses disclosed on the pleadings, on July 23, 2005.

s/ Joyce Brady

APPENDIX D

Nineteenth Judicial Circuit Court, McHenry County, Illinois

No. 96 CH 297

SHIRLEY A. ROCKSTEAD and CAROL J. HENDERSON, *et al.*,
Plaintiffs,

v.

CITY OF CRYSTAL LAKE, a municipal corporation,
*Defendant*s.

July 14, 2004

ORDER ON PENDING MOTIONS

This cause was before the Court on four Motions for Summary Judgment and Motion to Amend. This Motion's for Summary Judgment listed by date of filing are:

1. Motion for Summary Judgment filed by the City of Crystal Lake, a Municipal Corporation on December 12, 2003 and based upon the following arguments:

   a. Plaintiffs' Claim four Damages is barred by application of the one year limitations period of Section 8-101 of the Tort Immunity Act (745 ILCS 10/8-101).

   b. Plaintiffs' Claim for Injunctive Relief is barred by *laches*.

   c. Plaintiffs' Claim for Damages is barred by application of the immunity provisions of Section 2-201 of the Tort Immunity Act (745 ILCS 10/2-201), Section 3-103 of the Tort Immunity Act (745 ILCS 10/3-103) and Section 2-105 of the Tort Immunity Act (745 ILCS 10/2-105).

   d. Plaintiffs have failed to produce competent evidence of any damage.

2. Plaintiffs partial Motion for Summary

Judgment filed on March 8, 2004 seeking partial Summary Judgment on the City of Crystal Lake's affirmative defenses of statute of limitation and *laches*.

3. Motion for Partial Summary Judgment against railroad Defendant on its limitations and *laches* defenses against both Defendants on causation filed on April 26, 2004.

4. Defendant, Chicago Northwestern Railway Company's Motion for Summary Judgment filed June 21, 2004 which is based upon the following arguments:

   a. The railroad is entitled to possession of the affected land under the Doctrine of Adverse Possession and/or is entitled to continue to use the same land under the Doctrine of Prescriptive Easement.

   b. Plaintiff's Claim for Damages is barred by the statute of limitations.

   c. Plaintiff's Claim for Injunctive Relief is barred by the Doctrine of *Laches*.

5. Plaintiffs' Motion for Leave to File Second Amended Complaint and for Substitution of Parties filed Mach 12, 2004.

The parties have presented substantial written materials in support of or in opposition to the various motions. The Court will not list these materials but the Court does acknowledge receipt of the materials and has reviewed and considered same. The Court has also heard and considered oral arguments by counsel. The Court has further reviewed and considered the relevant statutory and case law citations presented by the parties.

This cause was filed by the Plaintiffs on October 19, 1994 as Case Number 94 CH 9413 in the Circuit Court of Cook County and transferred to the Circuit Court of McHenry County on August 14, 1996 as Case Number 96 CH 297. On March 14, 1997, an Amended Complaint was filed.

The Court will not attempt to recite all the factual materials presented in the respective statements of fact and responses thereto as the facts are contained in the written materials and are well known to the parties. The Court will make such reference to factual materials as is necessary to an understanding of this Order.

In 1968, the City of Crystal Lake installed a 36 inch

storm sewer pipeline in the Chicago Northwestern Railway Company right of way. This right of way is immediately adjacent to and contiguous with the Northwestern boundary of the Plaintiffs property. The Plaintiffs' claim that the actions of the City of Crystal Lake and the Chicago Northwestern Railway Company in constructing and maintaining the pipeline and the City by other activities on its property have cut off the natural flow of water off, across and around the Plaintiffs property and thereby caused substantial and continuing damages to Plaintiffs property.

After having considered all of the written submissions, oral arguments and citations of statutory and case law authorities, the Court will discuss its rulings as to each motion separately.

1. Motion for Summary Judgment filed by City of Crystal Lake, a Municipal Corporation, on December 12, 2004.

   The Court finds that the City of Crystal Lake has met its burden to establish that it is entitled to summary judgment on the basis of immunity under Section 2-201 of the Tort Immunity as to Plaintiffs damage claims. The Court comes to this conclusion based upon the method of analysis as set forth by

the Illinois Supreme Court in *Ven Meter vs. Darien Park District*, 207 Ill. 2nd 359 (2003). This Court finds that the City of Crystal Lake has presented sufficient support in the record to establish the City's action in this case were (1) the result of a policy decision and (2) discretionary. Based upon this immunity, the Court finds that the Plaintiffs Claim for Damages against the City of Crystal Lake is barred. The Court does not find that the Illinois Supreme Court Decision in *Snyder vs. Curran Township*, 167 Ill. 2nd 466 (1995) is inconsistent with a finding of immunity under the facts of this case.

The Court further finds that the city has not met its burden to establish that it is entitled to Summary Judgment on the basis of immunity under either Section 3-103 or Section 2-105 of the Tort Immunity Act in the circumstances of this case.

With regard to the City's argument that the one year statute of limitation of Section 8-101 of the Tort Immunity Act controls, the Court finds that *Zimmer vs. Village of Willowbrook*, 242 Ill. App. 3d 437 (2nd Dist.,

1993) is still good law and controls in the Second Appellate District. This Court does not believe that the ruling of the Illinois Supreme Court in *Tosado vs. Miller*, 188 Ill. 2nd 186 (1999) in any way impairs the validity of the *Zimmer* decision.

As to the City's argument that the Plaintiffs' Action for Injunctive Relief is barred by the Doctrine of *Laches*, the Court finds that the City has failed its burden of proof necessary to establish the Plaintiffs failed to bring their cause of action for injunctive relief within the 20 year limitation period recognized by the Illinois Supreme Court in *Meyers vs. Kissner*, 149 Ill. 2nd 1 (1992). The Court believes that a question of fact exists as to whether the Plaintiffs claim arises from a single overt act as alleged by the city or from a continuing nuisance from which claimant may select his own time to bring an action.

As to the damage issue, the Court finds that the Plaintiffs' evidence is sufficient to overcome the request for summary judgment.

2. Plaintiff's Motion for Partial Summary Judgment filed on March 8, 2004 seeking Summary Judgment on the City of Crystal Lake's Affirmative Defenses of Statutes of Limitations and *Laches*.

   While the Court has not granted the City's Motion for Summary Judgment on either the statute of limitations or *laches* bases, the Court does believe there are genuine issues of material fact in existence in this case that also require the Plaintiffs' motion to be denied as to the statute of limitations and *laches* affirmative defenses.

3. Motion for Partial Summary Judgment against the railroad defendant on its limitations and *laches* defenses and against both defendants on causation filed April 26, 2004.

   For the same reasons stated above, the Court will not grant the Plaintiffs' Partial Motion for Summary Judgment as to the railroad defendant on the affirmative defenses. On Plaintiffs' motion as it relates to causation, the Court finds the record establishes there is a genuine issue of material fact as to the

causation in this matter. The credibility and weight to be given to the two opinion witnesses in this case is of great importance in this case. If the trier of fact accepts the testimony of the Defendants' witness as to the deficits in the Plaintiffs' opinion expert's analysis and the lack of necessary information upon which to base any opinion, the ability of the Plaintiffs to meet their burden of proof on the issue of causation is in doubt.

4. Defendant, Chicago Northwestern Railway Company's Motion for Summary Judgment filed June 21, 2004.

The Court finds that the Defendant railroad has not established that it is entitled to Summary Judgment on the bases of either adverse possession or prescriptive easement.

Additionally, for the same reasons previously stated in regard to the Motion of the City of Crystal Lake, the Court finds that the Defendant railroad is not entitled to Summary Judgment on the bases of either statute of limitations or *laches*.

5. Plaintiffs' Motion for Leave to File Second Amended Complaint and for Substitution of Parties filed March 12, 2004.

   The Court will grant the Motion of the Plaintiffs for Leave to File a Second Amended Complaint and for Substitution of Parties without prejudice to the Defendants ability to file any appropriate responsive pleading.

THEREFORE, IT IS ORDERED THAT:

1. The Motion of the City of Crystal Lake for Summary Judgment as to Plaintiffs' damage claim is granted on the basis of immunity granted by 745 ILCS 10/201 and that Plaintiffs claim for damages against the City of Crystal Lake is dismissed.

2. The Motion of the City of Crystal Lake for Summary Judgment on the bases of immunity under 745 ILCS 10/3-103 and 10/2-105, limitations under 745 ILCS 10/8-101 or *laches* is denied.

3. Both of Plaintiffs' Partial Motions for Summary Judgment are denied.

4. Defendant, Chicago and Northwestern Railroad Company's Motion for Summary Judgment is denied.

5. Plaintiff is granted leave to file their Second Amended Complaint adding additional counts and substituting parties within seven days of this Order and Defendant's are granted 21 days to answer or otherwise plead to the Second Amended Complaint.

6. The case is set for a case management hearing on August 27, 2004 at 9:00 a.m.

ENTERED July 14, 2004 ENTER s/ Michael Sullivan
Michael J. Sullivan
CIRCUIT JUDGE

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause by depositing a copy thereof in the U.S. Mail, postage prepaid, in envelopes addressed to each of the attorneys of record herein at their respective addresses disclosed on the pleadings, on July 14, 2004.

s/ Joyce Brady

FILED
AUG 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1716

IN THE

Supreme Court of the United States

SHIRLEY A. ROCKSTEAD, *et al.*,

Petitioners,

v.

CITY OF CRYSTAL LAKE, ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition, where the Seventh Circuit's Opinion affirming the District Court's analysis under *Williamson County* does not conflict with the decisions of this Court or a Court of Appeals, and where Petitioners do not claim that the Seventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

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INTRODUCTION

The Petitioners have presented no compelling reasons for their Petition for a Writ of *Certiorari* to be granted ("Petition"). *See* Sup. Ct. R. 10. Specifically, the Petitioners fail to demonstrate that the Seventh Circuit's April 10, 2007, Opinion ("Opinion") is in conflict with a decision of this Court or another Court of Appeals or that the Seventh Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). In fact, the Petitioners have shown in their Petition that the District Court's dismissal of their federal claim was in accordance with this Court's decisions in *Williamson County Reg'l Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) and *San Remo Hotel v. County of San Francisco*, 545 U.S. 323 (2005). Therefore, the Petition should be denied[1].

The Petitioners claim that they seek reconsideration of *Williamson County's* state litigation rule based on the concurrence of Chief Justice Rehnquist in this Court's unanimous decision in *San Remo Hotel* in which the Chief Justice stated in concurrence that, "I believe the Court should reconsider whether Plaintiff asserting a Fifth Amendment

---

[1] The Petitioners note that *McNamara v. City of Rittman, Ohio* (No. 06-1481) presently pending for *Certiorari* before this Court presents related questions. The questions presented in that case are separate and distinct from those presented in this matter in that Ohio law did not initially provide a state procedure for obtaining compensation but during the pendency of that matter made such a procedure available thereby creating an issue of which claims were ripe and which may be barred by the Ohio Statute of Limitations. No such issue is present in this case as Illinois has always provided a state procedure for obtaining compensation.

takings claim based on the final decision of a state or local government entity must seek compensation in state courts." *Id.* at 352.

As *Certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law, this case presents no compelling reasons for *Certiorari* as none are alleged, rather the Petitioners request that this Court re-examine properly applied rules of law. (See Sup. Ct. R. 10).

This case does not present the opportunity for re-examination alluded to by Chief Justice Rehnquist in *San Remo* because a final state court decision has not been rendered in this case. Although the Petitioners' federal claim was filed as a § 1983 Fifth Amendment Just Compensation Action, the Petitioners never filed their § 1983 claim in state court despite the pendency of the Illinois. Thus, although Justice Rehnquist in *San Remo* suggested that the Court might reconsider Fifth Amendment takings claims based on a final decision of a state or local government entity, no such final decision has been made.

The Petitioners also claim that *Williamson County* should be reconsidered because, when coupled with § 1738, it prevents the Petitioners from bringing a Fifth Amendment takings claim in Federal Court. No compelling reasons are advanced by the Petitioners beyond the mere assertion that *Williamson County's* requirement that a Fifth Amendment § 1983 takings claim requires exhaustion of all state law remedies prevents an owner from subsequently bringing the same action in federal court. The relief sought by the Petitioners here is the very same as that which was considered and denied by this Court in *San Remo.*

The next claim is that *Williamson County's* state litigation requirements are suspect, in that they present a "Catch 22", because of the interaction between the state litigation requirement and § 1738. Here again the Petitioners present no compelling reasons for granting their Petition, and they fail to cite any instances in which Appellate Courts are in conflict with each other.

Finally, the Petitioners assert that the lower courts are bound to follow controlling state law decisions, which the Petitioners admit would bar their claim of inverse condemnation. Therefore, the Petitioners assert that the lower courts should have held that the procedure for compensation under Illinois law was unavailable, thereby making their federal claim ripe immediately. As Judge Posner stated in the Seventh Circuit's opinion, because the remedy available to the Petitioners is a state common law doctrine which judges might elect to change, and the Illinois Supreme Court has not addressed this matter since 1948, it is premature to conclude that the Illinois Supreme Court would deny relief on the basis of a mechanical application of the "temporary accumulations" doctrine.

In summary, the Petitioners present no compelling reasons for the grant of their Writ of *Certiorari* as their Petition addresses settled issues which do not merit this Court's attention. The assertion that the state litigation rule of *Williamson County* should be re-examined merely reiterates an issue decided by this Court as recently as 2005 in the *San Remo* case. In fact, their only assertion of error in the Courts below concerns the claim that the District Court and the Seventh Circuit Appellate Court erred in failing to hold that state compensation was unavailable. This claim is readily disposed of, since the Petitioners admit that they

sought relief from the Illinois state courts under a claim of inverse compensation under the Just Compensation Clause of Article I, Section 15 of the Illinois Constitution. Therefore, the clear letter of the law in Illinois provides a procedure by which the Petitioners may seek compensation for the taking of their land. Because the Petitioners have failed to carry their substantial burden of demonstrating that there are any compelling reasons for the Court to grant their Petition, the Petition should be denied.

STATEMENT OF THE CASE

Procedure

This matter dates back to a state court action initially filed in 1994. At that time, the Petitioners, Shirley A. Rockstead and Carol J. Henderson, alleged certain actions of the Respondent, the City of Crystal Lake, caused flooding on their property. The Petitioners argued that this damage constituted a taking without just compensation in violation of the Illinois Constitution. On July 27, 2005, the Circuit Court of McHenry County, Illinois, granted partial Summary Judgment in favor of Crystal Lake on the Petitioners' takings claims. The Court ruled that the City's actions, even when considering twelve years worth of evidence in a light most favorable to the Petitioners, did not constitute a taking. The state court found that occasional flooding, absent a showing of a permanent accumulation of surface water on the Petitioners' property, was insufficient to establish a physical taking. Because the Petitioners were unable to establish a permanent accumulation of surface water on their property, the court held that the Petitioners' attempt to compel the City to institute eminent domain proceedings was without merit. However, because this ruling was interlocutory and because

other claims and parties were named in the state litigation, the Petitioners could have sought leave to appeal this ruling under Illinois Supreme Court Rule 304(a) but failed to do so.

On August 8, 2005, the Petitioners filed their Complaint with the United States District Court for the Northern District of Illinois alleging an impermissible taking in violation of 42 U.S.C. § 1983 and § 1988, as well as the Fifth and Fourteenth Amendments to the United States Constitution. In their Complaint, the Petitioners alleged that they were entitled to federal court relief because all remaining state procedures to obtain recovery on their takings claims were inadequate and futile. Crystal Lake then filed its Motion to Dismiss arguing that the District Court lacked subject matter jurisdiction over the takings claim because the case was not yet ripe for Federal District Court review. Crystal Lake argued that in failing to assert their statutory right to appeal the partial summary judgment to the Appellate Court for the Second District of Illinois, the Petitioners failed to utilize all methods of redress available from the State of Illinois. Crystal Lake argued, therefore, that under the steadfast ruling of *Williamson County*, the Petitioners' complaint was premature.

The United States District Court for the Northern District of Illinois granted Crystal Lake's Motion to Dismiss pursuant to 12(b)(1) of the Federal Rules of Civil Procedure. In its written opinion, the District Court concluded that, pursuant to the U.S. Supreme Court's ruling in *Williamson County*, a plaintiff must exhaust all remedies made available by the state prior to seeking redress from the Courts of the United States. (Pet. App. at 20a-21a). The District Court found that the Petitioners could still [illegible] relief in the Illinois Appellate

Court. The Court ruled, that the Petitioners' Complaint would not ripen until the Second District affirmed the McHenry County Court's decision granting Crystal Lake's Motion for partial Summary Judgment. (Pet. App. at 20a-25a).

On October 31, 2006, the Seventh Circuit heard arguments on the Petitioners' appeal and issued a subsequent written opinion on April 10, 2007 affirming the judgment of the District Court in dismissing the Petitioners' federal cause of action as not ripe. The Seventh Circuit held that because these issues involve a common law doctrine and the Illinois Supreme Court has not visited the issue since 1948, it would be premature to conclude that an Illinois Appellate Court would deny relief to the Petitioners. (Pet. App. at 7a). Because the state court ruling was based on Illinois case law, the Petitioners need only distinguish that case law on appeal. Therefore, the Seventh Circuit held that the Petitioners did not fit within the unavailability exception of *Williamson County* and agreed with the District Court that because the Petitioners had not appealed the adverse state court ruling it cannot be conclusively determined that resort to the Illinois appellate system would be futile. Therefore, it cannot be said that the Petitioners have exhausted their state court remedies as required under this Court's ruling in *Williamson County.* This appeal followed.

Factual Background

The Petitioners, Shirley Rockstead and Carol Henderson, are the owners of property located in McHenry County, Illinois, a portion of which lies in the City of Crystal Lake. The property is undeveloped and zoned for industrial use. The City of Crystal Lake is a municipal corporation that owns and maintains real property, including a sewage disposal plant

and storm water detention ponds, which lies adjacent to and contiguous to the north and east sides of the Petitioners' property.

In 1968, Crystal Lake officials entered into a license agreement with Union Pacific Railroad, owners of a right-of-way running in a northeast-southwest direction to the west of the Petitioners' property. In accordance with the license agreement, the City was permitted to, and did, construct and maintain a pipeline running along the railroad's right-of-way, next to the Petitioners' property. The Petitioners allege that construction of this pipeline resulted in an obstruction of the natural flow of water from their property.

In 1994, the Petitioners instituted a cause of action complaining that Crystal Lake, in undertaking to build pipelines and other structures on Crystal Lake's own property, damaged the Petitioners' property. Specifically, the Petitioners claimed that building these public improvements caused water to drain toward, rather than away from, their land. They alleged that this change of flow lead to flooding, thereby converting their property to "useless wetlands."[2] The Petitioners filed their Complaint seeking damages at law,

[2] Although the Petitioners continue to claim that their property is now "valueless wetlands," the property remains listed for sale, and was subject to a $515,000 offer two years ago and a $900,000 offer this summer. In addition, although the Army Corps of Engineers initially classified the Petitioners' land as "wetlands," following this Court's ruling in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 121 S.Ct. 675 (2001), that classification was determined to be outside of the Army's jurisdiction by the Chicago district of the Army Corps of Engineers in 2002. Therefore, at present, there is no classification related to saturation attached to the Petitioners' land that restricts its use or sale.

injunctive relief, and a Writ of Mandamus asking that the McHenry County Court institute compelled eminent domain proceedings.

In accordance with the Illinois procedure for inverse condemnation, the Petitioners sought a writ of mandamus under Article I, Section 15 of the Illinois Constitution and under the Illinois Eminent Domain provisions of the Illinois Code of Civil Procedure, 735 ILCS § 5/7-101 *et seq.* However, after extensive discovery, the Petitioners were unable to establish that the property was flooded with permanent standing water, which according to Illinois case law, is a necessary component of a successful Illinois inverse condemnation action. See *People ex rel. Pratt v. Rosenfield* 399 Ill 247, 77 N.E.2d 697 (1948), *Luperini v. County of DuPage* 265 Ill.App.3d 84, 637.N.E.2d 1264 (2nd Dist. 1994).

Accordingly, on July 27, 2005, the McHenry County Court entered its Order On Motion For Partial Summary Judgment. The court held:

> "The Plaintiffs concede and, in fact, state that it was never their contention, that the Defendants have caused permanent standing water on their property." (Pet. App. at 35a).

The Court concluded that the Petitioners' claim was insufficient for an inverse condemnation action. Though other counts survived, the Court entered Judgment in the City of Crystal Lake's favor on the Petitioners' inverse condemnation counts.

The Petitioners never pursued their right to appeal the McHenry County Court's Order of Partial Summary Judgment in the Appellate Court for the Second District of Illinois. Rather, two weeks after the McHenry Court's Order, they filed suit in the U.S. District Court for the Northern District of Illinois. The Petitioners' Federal Complaint alleged that:

> "After 11 years of fruitless litigation in the Illinois state courts, plaintiffs have fully exhausted their state law remedies and it is apparent that the City and State will not pay them for just compensation. Therefore, plaintiffs have exhausted their state remedies which in any event are inadequate and further resort to them would be completely futile."

In lieu of answering the Petitioners' Complaint, Crystal Lake filed its Motion to Dismiss under 12(b)(6) of the Federal Rules of Civil Procedure. In its Motion to Dismiss, Crystal Lake argued that under *Williamson County*, the Petitioners failed to utilize all methods of recovery available by the State of Illinois, and therefore their takings claim was not ripe for review. The Petitioners responded that because Illinois law was so firmly entrenched in the notion that intermittent flooding is not a taking, any appeal would have been futile.

The United State District Court for the Northern District of Illinois concluded that, at the time the Petitioners filed their federal complaint, their case more appropriately belonged in the Illinois state court. In ruling on Crystal Lake's Motion to Dismiss, therefore, the District Court found that, pursuant to 12(b)(1), it was compelled to dismiss the Petitioners' Complaint because it lacked subject matter jurisdiction over the claim. The Court reasoned that, pursuant

to the United States Supreme Court's ruling in *Williamson County*, when a claimant fails to exhaust all state remedies, any federal claim that follows is not yet ripe for review. (Pet. App. at 20a-21a, 26a).

The Petitioners then appealed to the United States Court of Appeals for the Seventh Circuit. In affirming the decision of the District Court, the Seventh Circuit correctly applied the *Williamson County* Rule, holding that the Petitioners had failed to exhaust all state law remedies and therefore their federal claim was not ripe for review. Although the Petitioners argued to the Seventh Circuit that they fall within the exception to *Williamson County* because the Illinois procedure for inverse condemnation should be deemed "unavailable" because the Illinois case law appears to be adverse to the successful litigation of their claim, the Seventh Circuit held that one cannot conclude that resort to the Illinois appellate system would be futile since the Illinois courts have not re-visited the issue in almost fifty years. Furthermore, because the state court ruling was based on case law, the Seventh Circuit observed that the Petitioners need only distinguish that case law to overcome the McHenry County Circuit Court's grant of partial summary judgment. This appeal followed.

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with the decisions of this Court or any Court of Appeals, nor do they implicate a federal question that has not been decided by this Court. Accordingly, the Petitioners have not sustained their burden of demonstrating any "compelling reasons" for the Petition to be granted under Supreme Court Rule 10.

I. The District Court Properly Dismissed the Petitioners' Claims Because the Petitioners Failed to Exhaust Available State Remedies as Required under Williamson County and San Remo Hotel.

In order to bring an inverse condemnation claim in Federal Court pursuant to § 1983 and the Fifth Amendment, a Plaintiff must first exhaust all avenues available in the state court to recover for allegedly damaged property. *Williamson County*, 194. In *Williamson County*, this Court found that the Plaintiff's claim was not ripe for federal review because, in seeking compensation, the claimant did not utilize all procedures made available by the state prior to seeking federal redress. *Id.* In so ruling, the Supreme Court declared this a new "exhaustion requirement" for takings claims brought against a state, reasoning:

> "If a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the just compensation clause until it has used the procedure and been denied just compensation." *Id.* at 195.

The *Williamson County* state exhaustion requirement was reaffirmed by this Court in a similar context dealing with the effect of the exhaustion requirement and the full faith and credit clause as recently as 2005 in the case of *San Remo Hotel v. City and County of San Francisco, California*, 454 U.S. 323 (2005).

Just as does Tennessee in the *Williamson County* case, Illinois provides a procedure for seeking just compensation from a governmental entity in the context of a takings claim. (See Illinois Inverse Condemnation Statute, 735 ILCS 5/7-

101). In this case, the Petitioners initiated the proceeding of an Illinois inverse condemnation action in order to seek redress under the Illinois Constitution. However, the Petitioners abandoned these proceedings once the city prevailed on its motion for partial summary judgment in state court. Less than two weeks after that ruling, the Petitioners filed their complaint in Federal Court, rather than seeking leave to appeal the adverse ruling of the Circuit Court of McHenry County. The Petitioners justify this course of action by arguing that, because they cannot recover under Illinois case law, it would be futile to proceed further and therefore the Illinois procedure is unavailable to them.

Because Illinois provides for a state inverse condemnation proceeding and because the Petitioners have not appealed the denial of their state inverse condemnation claim in the Illinois court, the Petitioners have not exhausted all available means of redress provided by Illinois. As a result, the Petitioners' federal claim is not ripe for a determination under the rule expressed in *Williamson County.* Therefore, the District Court correctly held that it lacked subject matter jurisdiction over this case.

Furthermore, as held by the District Court and affirmed by the Seventh Circuit Court of Appeals, the existence of unfavorable case law does not render an appeal futile, nor does it constitute the constructive unavailability of an Illinois inverse condemnation procedure. As observed by the Seventh Circuit, if a statute or constitutional provision provided that inverse condemnation procedure cannot be used when intermittent flooding is at issue, recourse to state remedies would be pointless and not required. (Pet. App. at 4a). However, when as in this case, the denial of the Petitioners' claim rests on state common law, the Petitioners need only

distinguish the controlling case law in order to prevail on appeal. Indeed, the Petitioners do not pursue here their argument that state court relief is unavailable, only not yet resolved.

Therefore, because the Petitioners may appeal the state court grant of summary judgment against them but have chosen not to do so, instead filing a § 1983 Claim in federal court, it cannot be said that the Petitioners have met the requirement enunciated by this Court in *Williamson County.* Hence, the District Court's dismissal of the Petitioners' federal takings claim was consistent with this Court's decisions in *Williamson County* and *San Remo Hotel* and does not present any reason for this Court to now revisit those issues.

II. *This Courts' Holding in San Remo Hotel Expressly Denied the Petitioners' Argument that an Exception to § 1738 Should be Allowed for Takings Claims.*

Although the Petitioners phrase their argument that *Williamson County's* exhaustion requirement when viewed in combination with 28 U.S.C. § 1738 precludes the subsequent filing of a federal takings claim in new phraseology, the Petitioners are asking this Court to create an exception to Section 1738 in takings claims cases. This issue is identical to that addressed and specifically denied by this Court in *San Remo Hotel.*

In *San Remo Hotel*, this Court granted *certiorari* to determine whether an exception should be given to § 1738 in takings claims to allow for federal review once a state court has denied compensation. At the time, the decision by the Ninth Circuit Court of Appeals holding that federal review

of a takings claim was not ripe conflicted with that of the Second Circuit Court of Appeals decision in *Santini v. Connecticut Hazardous Waste Management Service*, 342 F3d 118 (2nd Cir. 2003). Therefore, unlike the current situation, when *San Remo* was reviewed in 2005, there existed between the Circuits a disagreement of the application of this law.

Indeed, the Petitioners' argument in *San Remo* is strikingly similar to that advanced by the Petitioners at bar. In *San Remo*, the court observed:

> "The essence of the Petitioners' argument is as follows: because no claim that a state agency has violated the federal takings clause can be heard in federal court until the property owner has "been denied just compensation" through an available state compensation procedure, federal courts [should be] required to disregard the decision of the state court in order to ensure that federal takings claims can be considered on the merits in . . . federal court." *San Remo* 545 U.S. at 338.

While the Petitioners in *San Remo* complained of the same procedural situation as presented here, namely that litigation of their federal takings claim in state court barred them from subsequently bringing that claim in federal court, this Court held that

> "there is, in short no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to re-litigate an issue an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all."

San Remo, at 343. The Court further reasoned that the argument that an exception should be made to § 1738 for takings claims fails because it assumes that courts may create exceptions to § 1738 whenever deemed appropriate. "Such a fundamental departure from traditional rules of preclusion, enacted into federal law, can be justified only if plainly stated by Congress." *San Remo*, at 344. "An exception to § 1738 will not be recognized unless a later statute contains an expressed or implied partial repeal. Congress must clearly manifest its intent to depart from § 1738." *San Remo*, 344-345.

The majority opinion in *San Remo* noted that the requirement that the property owners must seek compensation through state procedures does not preclude a state court from simultaneously deciding the property owner's claim under state law, and a claim that, in the alternative, the denial of the compensation would violate the Fifth Amendment of the Federal Constitution. *Id.* 346. Because of this juxposition, the Court noted that most of the cases in takings jurisprudence appear before this Court on *certiorari* from state courts of last resort. *Id.*, 347.

The concurrence of Chief Justice Rehnquist joined by Justices O'Connor, Kennedy, and Thomas upon which the Petitioners place their hope for the grant of this Petition concludes, along with the remainder of the Court, that there is no basis to exempt takings claims from § 1738 absent express direction by Congress. *Id.* 348. The Chief Justice noted that he believed the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity should first seek compensation in state court. *Id.* 352.

Despite the Petitioners' contention that this is an opportunity to re-examine the state litigation requirement of *Williamson County*, in the present case there has been no final state decision as the Petitioners failed to seek leave to appeal the Circuit Court of McHenry County's grant of summary judgment against their inverse condemnation claim and instead filed a § 1983 claim in federal court. Thus, the final decision sought to be re-examined by Chief Justice Rehnquist in concurrence in *San Remo* has not been rendered in this case as the remainder of the Petitioners' claims are still pending in state court.

III. Illinois Inverse Condemnation Law is Not so Firmly Entrenched that Any Attempt to Distinguish Based Upon Facts Should be Rendered Futile.

The Petitioners argue that because some judicial decisions are unfavorable to their takings claims the Petitioners may not win on appeal, and therefore pursuing an appeal would be futile. See generally *Luperini v. County of DuPage*, 265 Ill.App.3d 84, 637 N.E.2d 1264 (2nd Dist., 1994), *People exrel Pratt v. Rosenthal*, 399 Ill. 247, 251, 77 N.E.2d 697 (Ill. 1948). These cases hold that if a state's actions cause flooding on a land owner's property, the property owner is entitled to inverse condemnation proceedings only when the flooding causes permanent standing water on the property, leaving these land owners with simply a cause of action for damages or injunctive relief. *Luperini*, 637 N.E.2d at 1268.

The Petitioners argue that any attempt to distinguish their own case from these cases would be futile alleging that Illinois law absolutely bars the Petitioners from pursuing inverse condemnation as a remedy.

Notwithstanding the Seventh Circuit's observation that all the Petitioners need do is distinguish the present factual situation from those in the controlling case law on appeal, the Petitioners in the present matter have not brought their claims before the state court at all. Rather, they have filed this claim in federal court. As such, the Petitioners cannot conclusively derive a negative outcome for a claim not before or ruled upon by the state court as a reason for adducing the unavailability exception under *Williamson County.*

IV. *There is No Need to Reconsider Williamson County because it was Correctly Decided Under the Plain Text of the Fifth Amendment.*

The holding in *Williamson County* correctly follows the language of the Fifth Amendment which does not proscribe the taking of property, but rather prohibits its taking without just compensation. As noted in *Williamson County*, if the government has an adequate process for obtaining compensation and if resort to that process yields just compensation, then a property owner has no claim against the government for a taking. *Williamson County*, 194. Indeed, the Court in *Williamson County* recognized that if a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the just compensation clause until using the procedure and being denied just compensation. *Id.* 195. Thus, no Constitutional violation occurs until just compensation has been denied. This Court in *Williamson County* recognized that the Fifth Amendment is satisfied by a reasonable and adequate provision for obtaining compensation once a taking has occurred. *Id.*

As the Fifth Amendment does not require compensation to be paid in advance of a taking but only that a procedure for compensation be made available once a taking has occurred, and a state's action in taking is not complete until the state fails to provide compensation, *Williamson County* is correctly applied when, as here, the takings claimant has yet to exhaust state remedies for compensation.

V. *Following the Requirements of Williamson County, a Section 1983 Fifth Amendment Takings Claim May be Heard in Federal Court.*

The Petitioners argue that due to the interaction of *William County's* state exhaustion requirement and § 1738, the result is that a claimant who brings a takings claim in state court and loses will be subsequently barred from bringing that claim in federal court by res judicata and/or collateral estoppel. This interaction however, does not preclude a claimant from presenting their § 1983 claim in federal court if they comply with the state exhaustion requirement of *Williamson County. San Remo*, 545 U.S., 346.

In this case, rather then assert their § 1983 claim in state court, the Petitioners advanced only a state inverse condemnation claim. When that was denied, the Petitioners filed their federal claim in District Court. Had the Petitioners asserted their § 1983 claim in state court, they could have sought redress through the Illinois appellate court procedure whereby an adverse ruling on their § 1983 claim by the Illinois Supreme Court could be appealed to this Court.

The Petitioners' argument that they did not advance a § 1983 takings claim in state court because the Illinois Supreme Court has adopted *Williamson County's* ripeness

rule in a takings context is without merit. The Petitioners cite *Beneficial Dev. Corp. v. City of Highland Park*, 161 Ill. 2d 321, 641 N.E. 2d 435 (Ill. 1994) for the proposition that the Illinois Supreme Court has adopted *Williamson County's* ripeness rule in a federal takings context thus precluding them from bringing a § 1983 claim in state court.

In *Beneficial Dev. Corp.*, the plaintiffs asserted on appeal that the City of Highland Park violated § 1983 by conditioning the issuance of a building permit to Beneficial. 641 N.E.2d at 438. Because Beneficial stipulated at trial that it never applied for the building permit, the Illinois Supreme Court ruled that Beneficial's § 1983 claim was premature and did not consider it further. *Id.* Beneficial's § 1983 claim that they were denied the issuance of a building permit did not involve a takings issue and the Illinois Supreme Court's determination not to consider it was essentially premised on Beneficial's own stipulation that they had not been damaged by the city's denial of a permit Beneficial never requested.

This is a far cry from the Petitioners' assertion that the Illinois Supreme Court adopted *Williamson County's* ripeness rule in a federal takings context. At most, the Illinois Supreme Court's view of § 1983 in *Beneficial* can be said to stand for the proposition that a § 1983 claim in general is premature when the basis for such a claim is shown not to have occurred. Thus, the Petitioners have failed to conclusively demonstrate that Illinois case law would prevent them from filing a § 1983 claim along with their state court claims in accordance with *San Remo.*

VI. *Acceptance of Petitioners' Invitation Could Yield Broad Undesirable Results.*

Beyond rejecting century-old precedent, acceptance of the Petitioners' invitation would yield numerous alleged state taking victims to inundate the federal courts with petitions seeking similar relief.

The near unanimous twenty-two (22) year old precedent set forth in *Williamson County* based upon precedents which go back more than a century has been uniformly applied countless times by the Federal courts. Overruling long-standing precedent is something that this Court traditionally avoids.

Further, the relief which the Petitioners here are seeking, would result in sending countless state land disputes into federal court without the benefit of state court review. Increased federal litigation and the attendant docket management is also a concern of this Court.

Reconsideration of *Williamson* would logically call for the reconsideration of the parallel Due Process line of cases discussed by this Court in *Williamson County* such as *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908 (1981) as well as those lines of authority requiring claimants against the federal government to pursue their remedy in the United States Court of Federal Claims. Should *certiorari* be granted on *Williamson*, these and multiple other established lines of precedent would logically become subject to reconsideration as well.

CONCLUSION

The Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

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No. 06-1716

IN THE SUPREME COURT OF THE UNITED STATES

SHIRLEY A. ROCKSTEAD and CAROL J. HENDERSON,
Petitioners,

v.

CITY OF CRYSTAL LAKE, an Illinois municipal corporation,
Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioners Shirley A. Rockstead and Carol J. Henderson respectfully file this Reply to respondent City of Crystal Lake's Brief in Opposition to the Petition for a Writ of Certiorari.

ARGUMENT

The respondent City's arguments against granting certiorari are without merit.[1]

First, the City argues that this case is not worthy of review "because a final state court decision has not been rendered." (Brief in Opp., pp. 2, 16). However, that is precisely the point: the issue here is whether this Court should reconsider *Williamson County's* rule requiring petitioners to litigate in state court to a final state judgment. The City simply begs the question.

Moreover, the City is wrong in arguing that the late Chief Justice Rehnquist's *San Remo* concurrence

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[1] The City asserts some facts outside the record about the ultimate merits of this case. (Brief in Opp., p. 7 n.2). Petitioners have conclusive responses that are also beyond the record in this case and therefore not appropriate for inclusion in this Reply. However, in this Court and at this stage, as in the two courts below, those matters are completely beside the point. As the district court ruled, all petitioners' well-pleaded factual allegations must be accepted as true, a ruling that neither side has disputed. (Pet. App. 17a). Therefore, there are no factual issues that might make this case unsuitable for review. SUP. CT. R. 10.

"suggested that the Court might reconsider Fifth Amendment takings claims based on a final decision of a state or local government entity." (Brief in Opp., pp. 2, 16). Rather his concurrence in *San Remo*, joined by Justices O'Connor, Kennedy and Thomas, recommended reconsidering whether a Takings plaintiff should be required to obtain a final state judgment before suing in federal court. *San Remo Hotel, L.P. v. County of San Francisco*, 545 U.S. 323, 349, 125 S. Ct. 2491, 2508 (2005) (Rehnquist, C.J., concurring).

Second, the City is wrong in arguing that "[t]he relief sought by the petitioners here is the very same as that which was considered and denied by this Court in *San Remo*." (Brief in Opp., pp. 2, 13-16).

As the Chief Justice pointed out in his *San Remo* concurrence, *Williamson County's* state-litigation rule was not before the Court in *San Remo* because "neither party . . . asked [the Court] to reconsider it, and resolving the issue could not benefit [the *San Remo*] petitioners." 545 U.S. at 352, 125 S. Ct. at 2510. In contrast, petitioners in this case are explicitly asking the Court to reconsider *Williamson County*, and resolving this issue in petitioners' favor would most definitely benefit them by reopening the doors of the federal court.

Third, the City is conspicuously silent about the fact that *Williamson County's* underlying textual rationale – *i.e.*, that the Fifth Amendment does not proscribe a taking, but only a taking without compensation (Brief in Opp., pp. 17-18) – is directly contrary to this Court's line of decisions in *physical takings* cases which hold that the constitutional violation occurs at the time of the taking.

United States v. Dickinson, 331 U.S. 745, 751 (1947) ("[T]he land was taken when it was taken and an obligation to pay for it then arose."); *United States v. Dow*, 357 U.S. 17, 22 (1958) ("The usual rule is that if the United States has entered into possession of the property prior to the acquisition of title, it is the former event which constitutes the act of taking."); *United States v. Clarke*, 445 U.S. 253, 258 (1980) ("When a taking occurs by physical invasion . . . the usual rule is that the time of the invasion constitutes the act of taking, and '[it] is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued.'").

The City's failure to address this important issue underscores the lack of merit to the City's Opposition and emphasizes the need for this Court's reconsideration of *Williamson County*.

Fourth, the City disagrees with petitioners' assertion that the Illinois courts apply *Williamson County's* ripeness rules and quibbles about the Illinois Supreme Court's holding in *Beneficial Dev. Corp. v. City of Highland Park*, 161 Ill. 2d 321, 328, 641 N.E.2d 435, 438 (1994), even though that decision held the property owner's Section 1983 claim, brought in Illinois state court, to be "premature" explicitly on authority of *Williamson County*. *Id.*

What the City does not dispute, however, is its ability to remove petitioners' Section 1983 Takings claim from state court to federal court and obtain both the dismissal of that claim as unripe and the remand of the remainder of the case back to state court pursuant to the rules of *City of Chicago v. Int'l College of Surgeons*, 522

U.S. 156 (1997), and *Key Outdoor, Inc. v. City of Galesburg*, 327 F.3d 549 (7th Cir. 2003). Thus, the City makes nothing of the obvious unfairness of allowing a governmental defendant to remove a Section 1983 Takings claim to the same federal court where a property owner is barred from filing that claim in the first place.[2]

Fifth, the City warns of dire consequences that will arise from overruling *Williamson County* – the "broad undesirable results" of rejecting "century-old precedent," "sending countless state disputes into federal court," and the need to reconsider the parallel Due Process line of cases, "such as *Parratt v. Taylor*, 451 U.S. 527 (1981)."[3]

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[2] Related to this point is the City's argument that because this Court has the power to review decisions of the Illinois Supreme Court, the requirements of *Williamson County* would still allow petitioners' Section 1983 Takings claim to be "heard in federal court." (Brief in Opp., p. 19). That argument is a non-sequitur because *Williamson County* prohibits petitioners from filing the Section 1983 claim in the federal district court; it has nothing to do with this Court's power of review of state court decisions.

[3] If review is accepted of this case, there will clearly be no need to reconsider *Parratt*, which is easily distinguishable as involving random unauthorized acts of state employees, not the considered conduct pursuant to a local governmental policy and procedure presented by this case. *See* Brief for Elizabeth Newmont et al. as *Amici Curiae* Supporting Petitioners 11-12. Moreover, petitioners cannot help but note that the City's citation of *Parratt* hardly makes the City's point because it was

(continued...)

(Brief in Opp., p. 20).

These are all straw men. While petitioners respect the general principles of stare decisis, *Williamson County*, decided in 1985, is hardly an ancient precedent. Nor does this case present a risk of flooding (perhaps a poor choice of a word in this case) the federal courts with land-use cases because it is of the class of physical takings cases that, as this Court has noted, "are relatively rare, easily identified and usually represent a greater affront to individual property rights," *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002), and which "present[] relatively few problems of proof." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437 (1982). Moreover, this case presents an even narrower issue: whether petitioners' further litigation in the Illinois appellate courts should be excused as futile because Illinois inverse condemnation law (which the federal courts are required to accept) is so clearly against them. (Pet., pp. 29-30). Furthermore, reconsideration of *Williamson County* will not require re-examination of other lines of cases because it is the outlier, inconsistent with the well-accepted rule that a Section 1983 plaintiff need not exhaust state remedies. (Pet., pp. 24-26). Reconsideration of *Williamson County* will likely conform it to several lines of decisions.

Chief Justice Rehnquist's *San Remo* concurrence persuasively explained that *Williamson County* "may have

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[3](...continued)
itself partially overruled a short five years later by *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986).

been mistaken" and "has created some real anomalies" that justify its reconsideration. This case therefore falls within the class of cases that justify reconsideration because it is "outdated," "ill-founded," "badly reasoned," "unworkable" and "otherwise legitimately vulnerable to serious reconsideration." (Pet., pp. 13-14 citing cases).

There are powerful reasons supporting reconsideration of *Williamson County's* state-litigation rule – four Justices of this Court have said that it should be reconsidered and the Petition presents an additional set of persuasive reasons to do so. Yet, says the City, those reasons are not "compelling" and reconsideration of *Williamson County* should not be undertaken. (Brief in Opp., pp. 4, 21).

In contrast, the City argues that petitioners must pursue their Illinois appellate remedies and seek to overturn, or at least distinguish, the Illinois permanent flooding rule. Yet, the pertinent Illinois inverse condemnation decisions say nothing that suggests that the permanent flooding rule is subject to any question or ripe for reconsideration or distinguishable from this case. The most that can be conjured up is the "glimmering" the Court of Appeals saw (Pet. App. 6a), a light too faint for petitioners. Nevertheless, the City insists that petitioners must pursue a futile state appeal and seek to overturn a state law rule which the City itself has argued is "well-settled" and which, in any event, the federal courts are obligated to accept in the first instance. (Pet., pp. 29-30).

The City's self-contradictory arguments are painfully ironic. Worse, they are contrary to the "concepts of 'fairness and justice' that underlie the Takings Clause." *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001)

(internal citations omitted).

This case is clearly worthy of plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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SHIRLEY ROCKSTEAD, *et al.*,

Petitioners,

v.

CITY OF CRYSTAL LAKE,

Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this *amicus curiae* brief supporting Petitioners.[1] NAHB represents over 235,000 builder and associate members throughout the United States, including individuals and firms that construct and supply single-family homes, as well as apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. It is the voice of the American shelter industry. It is, and historically has been, vitally concerned with judicial decisions regarding government regulation and taking of private property.

NAHB appeared before the Court as a petitioner in a case decided earlier this term concerning the Clean Water and Endangered Species Acts, *NAHB v. Defenders of Wildlife*, 551 U.S. ----, 127 S.Ct. 2518 (2007). It has also participated as *amicus curiae* or "of counsel" in a number of cases involving landowners aggrieved by over-zealous regulation under a wide array of statutes and regulatory programs. A list of those cases is attached as Appendix A to this brief.

NAHB has frequently asked this Court to clarify procedural and jurisdictional issues so Fifth Amendment takings claims can be resolved on their merits. Too often, ripeness principles are misapplied to operate as an unfair bar, denying land owners full and fair federal court access

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[1] Letters of consent are on file with the Clerk. Pursuant to Rule 37.6 of this Court, NAHB states that its counsel authored this brief. The brief was not written in whole or part by counsel for a party, and no one other than *amicus* made a monetary contribution to its preparation.

on constitutional takings claims. NAHB thus offers its experience in this field and a national perspective to support the Petitioners.

SUMMARY OF ARGUMENT

This matter provides another opportunity for the Court to clarify the confusion regarding ripeness for claims under the Fifth Amendment's Takings Clause. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985), established the rule that a takings claim does not become ripe for federal court adjudication until the aggrieved property owner pursues inverse condemnation litigation in state court. Four concurring Justices in *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323 (2005), stated that this state-litigation rule "may have been mistaken," and that "[i]t is not clear that *Williamson County* was correct in demanding" that a claimant must first seek a compensation remedy through state litigation as a prerequisite to ripen a federal takings claim. *Id.* at 348-349 (Rehnquist, C.J., concurring). The *San Remo* concurring Justices believed that *Williamson's* "state-litigation rule has created some real anomalies, justifying our revisiting the issue." *Id.* at 351.

The court of appeals' decision provides the opportunity "revisit" the "real anomalies" created by *Williamson.* The state-litigation rule has been thoroughly aired in the lower federal and state courts. Postponing review will not contribute to resolution of the open questions generated by *Williamson*, inconsistencies within this Court's takings jurisprudence will linger, and conflicting lower court decisions will proliferate. Respectfully, NAHB encourages this Court to grant the petition, reconsider the state-litigation element of *Williamson*'s ripeness doctrine — and dispense with it.

ARGUMENT

I. THE PETITION PROVIDES AN APPROPRIATE VEHICLE TO RECONSIDER THE STATE-LITIGATION RULE.

A. *Williamson:* The State-Litigation Rule.

"There are two independent prudential hurdles" to ripen a takings claim. *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725, 733-34 (1997). These were established in *Williamson.* First, takings claims are not ripe "until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson,* 473 U.S. at 191. This "finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury ...." *Id.* at 193. The finality requirement is not at issue.

Williamson's second ripeness requirement is called into question here: "[If] a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and has been denied just compensation." *Id.* at 195. Concurring in *San Remo,* the late Chief Justice Rehnquist, joined by former Justice O'Connor and Justices Kennedy and Thomas, labeled this requirement the "state-litigation rule." *San Remo,* 545 U.S. at 349, (Rehnquist, C.J., concurring). They described the rule as follows: "Until the claimant had received a final decision of compensation through all available state procedures, such as by an inverse condemnation action ... he 'could not claim a violation of the Just Compensation

Clause.'" *Id.* at 349 (citing *Williamson*, 473 U.S. at 195-196).

B. *San Remo:* The State-Litigation Rule Meets Issue Preclusion.

San Remo did not directly address the validity of the state-litigation rule. Rather, the question was whether a takings claimant, in initial state litigation, could reserve a Fifth Amendment claim for subsequent federal adjudication. *San Remo* ruled that such a reservation was inappropriate, resolving a circuit split on that point. *Id.* at 337-338. The Court further held it was "not free to disregard the full faith and credit statute [28 U.S.C. § 1731] solely to preserve the availability of a federal forum" after initial state litigation mandated by *Williamson*. *Id.* at 347. Issue preclusion was thus held to bar relitigation in federal court after a "state court actually decided an issue of fact or law that was necessary to its judgment" — even if a takings plaintiff "would have preferred not to litigate [first] in state court, but was required to do so by statute or prudential rules." *Id.* at 342.

The *San Remo* concurrence was concerned that the Court's holding regarding issue preclusion "ensures that litigants who go to state court to seek compensation will likely be unable later to assert their federal takings claims in federal court ...." *Id.* at 351 (Rehnquist, C.J., concurring).[2] Takings law experts have put the problem this way:

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[2] This is exactly what has transpired. By the mid-1990s, the lower federal courts overwhelmingly invoked the state-litigation rule to avoid adjudicating the merits of Fifth Amendment takings claims. See John Delaney and Duane Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings*

> [A]s a reward for following the rules and trying to ripen their federal claims in state court as spelled out by *Williamson County,* property owners have the rug yanked out from under them by federal courts saying the door to that courthouse is now closed, because the very act of "ripening" the case actually sounded its death knell.

Michael Berger and Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases At Long Last Reaches The Self-Parody Stage,* 36 Urb. Law. 671, 687 (Fall 2004). The preclusive effect of state takings decisions, causing the virtual wholesale relinquishment of jurisdiction by the federal courts over Fifth Amendment takings claims, prompted the *San Remo* concurring Justices to question the state-litigation rule's propriety. They wrote it was not "clear" that *Williamson* "was correct in demanding that, once a government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court." *San Remo,* 545 U.S. at 349 (Rehnquist, C.J., concurring). The concurrence doubted

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Plaintiffs can Enter the Federal Courthouse, 31 Urb. Law. 195, 203-205 (Spring 1999) (surveying all land-use takings cases with a federal court decision from 1990-1998). As a preeminent takings scholar testified before Congress, the lower federal courts have exhibited "wholesale abdication of federal jurisdiction" over Fifth Amendment claims and have achieved the "undeserved and unwarranted result [of] avoid[ing] the vast majority of takings cases on their merits." Hearing on H.R. 1534 Before the Subcomm. on Courts and Intellectual Prop., House Judiciary Comm., 105th Cong. 67 (1997) *reprinted in* 31 Urb. Law. 234, 236 (Summer 1999) (testimony of Prof. Daniel Mandelker).

that "either constitutional or prudential principles" should first require exhaustion of all state compensation procedures before a claimant can vindicate Fifth Amendment rights. *Id.* The concurring Justices acknowledged that *Williamson*'s "state-litigation rule has created some real anomalies, justifying our revisiting the issue." *Id.* at 351.[3]

C. The State-Litigation Rule was Essential to the Court of Appeals' Decision Below.

The decision below provides a text book example of *Williamson*'s effect in barring federal courts from deciding Fifth Amendment takings claims on their merits. Here, Petitioners' parcel is adjacent to stormwater detention ponds and wastewater treatment facilities owned by the city. The city's management of these features caused periodic flooding on Petitioners' property, thereby converting "productive farmland into worthless wetlands." Pet. App. 3a. Since 1948, Illinois case law has held that an inverse condemnation suit will not lie for damages from "intermittent flooding," and Petitioners thus lost their case at the state trial level. Pet. App. 3a (citing *People ex rel. Pratt v. Rosenfeld,* 77 N.E.2d 697, 699-700 (Ill. 1948)).

No further appeals were sought in the Illinois courts because Petitioners saw "no point in continuing in state

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[3] The lower courts would agree. See, *e.g., Kottschade v. City of Rochester,* 319 F.3d 1038, 1041 (8th Cir.) (state-litigation rule has created an "anomalous ... gap in Supreme Court jurisprudence"), *cert. denied,* 540 U.S. 825 (2003); *Wilkinson v. Pitkin County Bd. of Comm'rs,* 142 F.3d 1319, 1325 n. 4 (10th Cir. 1998) ("It is difficult to reconcile the [state litigation] ripeness requirement of *Williamson*" with issue and claim preclusion).

court because the outcome is foreordained by state law." Pet. App. 4a. So, they filed a Fifth Amendment takings suit in federal court. The court of appeals, however, deemed the suit unripe under *Williamson*. Writing for the court, Judge Posner decided that further pursuit of state appeals could still provide a light at the end of the tunnel because judges "can — and do — change common law doctrines." *Ibid.* The court of appeals saw a "glimmering of recognition" provided by a single 1994 state intermediate appellate decision that Illinois law could, after all of these years, change course to recognize an inverse condemnation claim due to intermittent flooding. Pet. App. 6a. (citing *Luperini v. County of DuPage,* 637 N.E.2d 1264 (Ill. App. 1994)). Judge Posner thus concluded that the district court properly dismissed Petitioners' federal takings claim because they did not pursue state litigation to its ultimate appellate conclusion. Pet. App. 9a-10a.

In the entire, tortured history of post-*Williamson* cases, the court of appeals' decision is among the more extreme. Until now, no circuit has so harshly decided that the state-litigation rule compels takings claimants to pursue all levels of appeals up through and including a state supreme court (assuming the state supreme court accepts the case under its own rules for *certiorari* review). And, Judge Posner's decision requires takings claimants to possess predictive powers and/or incredible luck, in the hope that a state's highest court might possibly reverse earlier, long-standing precedent. For, if a takings plaintiff does not pursue state litigation and appeals at all levels of the state system, they will never have the merits of their Fifth Amendment claim decided by *any* court. As Judge Posner stated, if "the property owner goes through the entire state proceeding, and he loses, he cannot maintain a federal suit" due to *res judicata* and the doctrine against claim splitting. Pet. App.

9a. In other words, [t]he litigation in state court is the end of the road" for property owners bringing Fifth Amendment claims. *Ibid.*

Thus, the court of appeals held that: (1) *Williamson requires* federal takings claims to be filed in state court; and (2) that claim will *never* be heard in federal court, because *res judicata* would preclude federal adjudication. If this Court agrees with the court of appeals' reading of *Williamson* – that the lower federal courts are effectively barred from deciding the merits of cases arising under the Takings Clause – then it needs to announce that radical notion once and for all, in clear and unmistakable terms.

If Judge Posner's conclusion is correct, then the only cases in which lower federal courts are available to decide takings claims occur when the United States is sued and the amount in controversy exceeds $10,000. In that narrow set of cases, 28 U.S.C. § 1491(a) confers jurisdiction on the Court of Federal Claims and the Federal Circuit has appellate review. See, *e.g.*, *John R. Sand & Gravel Co. v. United States,* 457 F.3d 1345 (Fed. Cir. 2006), *cert. granted,* 75 U.S.L.W. 3474 (U.S. May 29, 2007) (No. 06-1164). Otherwise, the *only* other federal court that will substantively interpret the Takings Clause is *this* Court, when it elects to grant *certiorari* from the decision of a state's highest court. Thus, the federal district courts and circuit courts of appeals are divested from analysis of a Bill of Rights provision. They are deprived the opportunity to serve as laboratories for Fifth Amendment study, as the Takings Clause has become the virtual exclusive domain of state courts.

This cannot be right. "[A] case containing claims that local administrative action violates federal law ... is within

the jurisdiction of the federal district courts." *City of Chicago v. Int'l Coll. of Surgeons,* 522 U.S. 156-163 (1997). With respect, the Court should grant *certiorari* to reverse the court of appeals.

D. Unlike *San Remo,* This Case Squarely Questions the Validity of the State-Litigation Rule.

The state-litigation rule's validity was not directly put to the Court in *San Remo*, as it is in the case at bench. In *San Remo,* many *amici* (including NAHB) urged the Court to directly confront *Williamson.* But the invitation was declined because "no court below ha[d] addressed the correctness of *Williamson County,* neither party ha[d] asked us to reconsider it, and resolving the issue could not [have] benefit[ed] petitioners." *Id. San Remo,* 545 U.S. at 352. (Rehnquist, C.J., concurring). The converse is true here. First, the court of appeals *did* consider *Williamson*'s impact (Pet. App. 4a-5a; 9a-10a), and second, one of the petition's questions plainly asks the Court to reconsider the state-litigation rule.

Third, resolving the issue would benefit Petitioners. If the Court reconsiders the state-litigation rule and removes it from the ripeness landscape, Petitioners would receive a federal adjudication on the merits of their physical takings claim arising from intermittent but recurring floods – which they can not obtain in state court, because Illinois's well-settled law allows compensation only for permanent flooding. Pet. App. 6a-8a. But see *San Diego Gas & Elec. Co. v. City of San Diego,* 450 U.S. 621, 657 (1981) (Brennan, J., plurality dissent) ("Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable. Nor does the temporary reversible quality of a regulatory 'taking' render compensation for the time of the 'taking' any less

obligatory. This Court more than once has recognized that temporary reversible 'takings' should be analyzed according to the same constitutional framework applied to permanent, irreversible 'takings'"); *United States v. Cress,* 243 U.S. 316, 328 (1917) ("the right to compensation must arise" whether inundation is "permanent" or "intermittent but inevitably recurring").

In short, this is an "appropriate case" to "reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts." *San Remo,* 545 U.S. at 352 (Rehnquist, C.J., concurring).

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONTRADICTIONS IN THIS COURT'S TAKINGS CASES AND CONFLICTS IN THE LOWER COURTS — ALL ARISING FROM THE STATE-LITIGATION RULE.

The *San Remo* concurring Justices acknowledged that *Williamson*'s "state-litigation rule has created some real anomalies, justifying our revisiting the issue." *Id.* at 351. Those anomalies include contradictions within this Court's own takings decisions as well as divisions among the circuit courts.

A. Contradictions in This Court's Takings Cases.

1. Conflict Between *Williamson* and *San Remo.* Tension is especially pronounced between *Williamson* and *San Remo.* The *Williamson* Court stated that exhaustion of state compensation procedures is a first step to ripen federal takings claims: "*[U]ntil* [plaintiff] has utilized [state] procedure[s], its takings claim is *premature.*" *Williamson,*

473 U.S. at 197 (emphasis supplied).[4] Virtually every court of appeals has interpreted this language to mean that a Fifth Amendment takings claim is not ripe — it does not exist — until a property owner has filed suit for inverse condemnation in state court and has been denied compensation.[5] Many commentators also read *Williamson* as providing the opportunity for ultimate federal adjudication following denial of compensation in state court.[6]

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[4] See also *Williamson,* 473 U.S. at 194 ("A second reason the takings claim is *not yet ripe* is that respondent did not seek compensation through the procedures the state has provided for doing so") (emphasis supplied); *id.* at 195 ("the property owner cannot claim a violation of the Just Compensation Clause *until it has used* the [available state] procedure and been denied just compensation") (emphasis supplied). *id.*

[5] *Deniz v. Mun. of Guaynabo,* 285 F.3d 142, 146 (1st Cir. 2002); *Southview Assocs., Ltd. v. Bongartz,* 980 F.2d 84, 99-100 (2d Cir. 1992), *cert denied,* 507 U.S. 987 (1993); *County Concrete Corp. v. Town of Roxbury,* 442 F.3d 159, 168 (3d Cir. 2006); *Henry v. Jefferson County Planning Comm'n,* 34 Fed. Appx. 92, 96 (4th Cir. 2002); *Samaad v. City of Dallas,* 940 F.2d 925, 933-36 (5th Cir. 1991); *Peters v. Fair,* 427 F.3d 1035, 1038 (6th Cir. 2005); *Forseth v. Vill. of Sussex,* 199 F.3d 363, 368-73 (7th Cir. 2000); *Kottschade v. City of Rochester,* 319 F.3d 1038, 1041(8th Cir.), *cert. denied,* 540 U.S. 825 (2003); *Sinclair Oil Corp. v. County of Santa Barbara,* 96 F.3d 401, 405-07 (9th Cir. 1996), *cert. denied,* 523 U.S. 1059 (1998); *Bateman v. City of W. Bountiful,* 89 F.3d 704, 708-09 (10th Cir. 1996); *Agripost, Inc. v. Miami-Dade County,* 195 F.3d 1225, 1234 (11th Cir. 1999), *cert denied,* 531 U.S. 815 (2000).

[6] See, *e.g.,* Steven J. Eagle, *Regulatory Takings,* 1062, 2d ed. (2001) ("The 'ripeness' metaphor is one that promises ultimate vindication"); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation,* 11 J. Land Use & Envtl. L. 37, 67 (1995) ("the language ... suggests that the

The Court's opinion in *San Remo*, however, upends this widespread understanding. It declared that federal takings claims could, in fact, be asserted *during* a state lawsuit:

> The requirement that aggrieved property owners must seek "compensation through the procedures the State has provided for doing so" ... does not preclude state courts from hearing *simultaneously* a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution.

San Remo, 545 U.S. at 346 (citing *Williamson,* 473 U.S. at 194) (emphasis supplied). Thus, while *Williamson* rules that a federal takings claim is not ripe until *after* the state denies compensation, *San Remo* rules that federal claims can be brought *simultaneously* with state claims in state court.

So, which is the rule? Are *Williamson* and *San Remo* reconcilable, or in hopeless conflict? How is it that a Fifth Amendment claim can be brought simultaneously with a state inverse condemnation claim in state court, if that federal claim is not ripe until after the state denies compensation? How would the process of bringing simultaneous claims work? Should the state and federal takings claims be brought in state court sequentially, in that order? Are they part of the same, or separate, lawsuits?

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state law is merely preparatory to a federal suit"); Madeline J. Meacham, *The Williamson Trap,* 32 Urb. Law. 239, 249 (2000) ("language ... of *Williamson* suggests that a federal claim will survive after disposition in the state court").

What effect does *San Remo*'s simultaneous claim rule have on case law from the lower federal courts, cited *supra* n. 5, which have been virtually unanimous that they lack jurisdiction over Fifth Amendment takings claims until after state litigation is over? Are these opinions now overruled?

The petition should be granted so the Court can clarify the apparent contradictions between *Williamson*'s rule that state litigation is a condition precedent to ripen a federal takings claim, and *San Remo*'s rule that federal and state takings cases can be brought simultaneously in state court.

2. Conflict With This Court's Decision on Removal Jurisdiction in *City of Chicago.* Another anomaly is that the state-litigation rule is irreconcilable with *City of Chicago v. Int'l Coll. of Surgeons,* 522 U.S. 156 (1997). There, a plaintiff brought both federal and state takings claims in state court. The city then removed the case to federal court. This Court, without discussing *Williamson*, allowed the removal to stand because "a case containing claims that local administrative action violates federal law ... is within the jurisdiction of the federal district courts." *Id.* at 528-529. Under the federal removal statute,[7] a case can be removed from state to federal court only if it could have been brought in federal court *originally*.

Therein, the seeds of more conflict are sown. Under *Williamson,* federal courts do *not* have original jurisdiction over federal takings claims because they are not ripe until

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[7] "[A]ny civil action brought in a State court of which the district courts of the United States have *original jurisdiction*, may be removed by the defendant ... to the district court." 28 U.S.C. § 1441(a) (emphasis supplied.)

the property owner brings state litigation and loses. *San Remo* confirms that there is no original federal court jurisdiction over federal takings claims, and counsels that they may be brought simultaneously with state inverse condemnation claims in state court. Yet under *City of Chicago,* federal courts *do* have original jurisdiction over federal takings claims because a municipality has the right to remove them to federal court. The upshot is that federal courts decide federal takings claims only at the whim of municipal defendants who decide to exercise their removal option. The petition should be granted to address the dilemma created by *Williamson, San Remo,* and *City of Chicago,* as to whether federal courts do, in fact, possess "original jurisdiction" over Fifth Amendment takings claims.

3. Conflict With This Court's Decision on Seventh Amendment Rights in *Del Monte Dunes.* The state-litigation rule also generates friction with *City of Monterey v. Del Monte Dunes,* 526 U.S. 687 (1999). There, this Court held that takings plaintiffs in Section 1983 litigation have a Seventh Amendment right to a jury trial on issues of government liability. That is in stark contrast to the practice in state courts generally, which do not submit takings liability issues to juries. *Id.* at 719. Indeed, here the Petitioners did not receive a jury trial on whether their claim for intermittent but recurring flooding rendered Respondent liable to pay just compensation. If *Williamson* truly compels state litigation to ripen Fifth Amendment claims, and *San Remo* allows simultaneous litigation of federal and state takings claims in state court, then the Seventh Amendment rights confirmed by *Del Monte Dunes* are illusory in states that do not provide jury trials on takings liability.

Unlike the Fifth Amendment, which was the first guarantee in the Bill of Rights to apply to the states through the Fourteenth Amendment, see *Chicago, B. & Q. R. Co. v. Chicago,* 166 U.S. 226 (1897), "[i]t is settled law that the Seventh Amendment does not apply" to "suits decided by state court." *Del Monte Dunes,* 526 U.S. at 719. This Court's attention is needed to ensure that the state-litigation rule does not abrogate Seventh Amendment rights guaranteed by the United States Constitution.

B. Conflict in the Circuit Courts.

1. Circuit Conflict on Claim Preclusion. *San Remo*'s holding is arguably limited to issue preclusion or collateral estoppel,[8] but the language in the Court's opinion is broad enough to encompass claim preclusion or *res judicata* as well.[9] In any event, there is a circuit conflict as to whether the state-litigation rule triggers *res judicata* to bar subsequent federal takings claims. While not citing *San Remo,* in the case at bench the court of appeals stated that the rule against claim splitting applies, "thus barring by virtue of the doctrine of res judicata a subsequent suit filed

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[8] See *San Remo,* 545 U.S. at 342 ("The relevant question ... is whether the state court actually decided an issue of fact or law that was necessary to its judgment"); *id.* at 343 ("... we are presently concerned only with issues actually decided by the state court[s] that are dispositive of federal claims raised under § 1983").

[9] *Id.* at 336 (full faith and credit statute "has long been understood to encompass the doctrines of res judicata, or 'claim preclusion,' and collateral estoppel, or 'issue preclusion'"); *id.* at 344 (federal courts may not "simply create exceptions" to full faith and credit statute and "depart[ ] from traditional rules of preclusion") (citations omitted).

under federal law." Pet. App. 9a. The Seventh Circuit thus joined the Third and Tenth Circuits in extending claim preclusion to bar subsequent federal takings claims after mandatory state proceedings have resulted in the denial of compensation under state law.[10] The Second, Sixth, and Ninth Circuits disagree. They have decided that compelled resort to state court under *Williamson* does not extinguish Fifth Amendment claims subsequently filed in federal court.[11] As the Sixth Circuit observed in rejecting a claim preclusion defense: "[The] interaction of *Williamson County*'s ripeness requirements and the doctrine of claim preclusion could possibly operate to keep every regulatory takings claimant out of federal court." *DLX, Inc.*, 381 F.3d at 521.

Significantly, the Ninth Circuit has plainly distinguished between issue and claim preclusion in the context of the state-litigation rule. In *San Remo*, 364 F.3d 1088, 1096 (9th Cir. 2004), it invoked *issue* preclusion to bar relitigation in subsequent federal proceedings, and this Court affirmed, 545 U.S. 323 (2005). But in *Dodd*, 59 F.3d at 869-70, the Ninth Circuit refused to deal the *claim* preclusion card:

> [To] hold that a takings plaintiff must first present a Fifth Amendment *claim* to the state court system ...

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[10] See *Peduto v. City of N. Wildwood*, 878 F.2d 725 (3d Cir. 1989); *Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319 (10th Cir. 1998).

[11] See *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir. 2003), overruled as to issue preclusion and claim reservation by *San Remo*, 545 U.S. at 342; *DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004); *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995).

> would be to deny a federal forum to every takings claimant. We are satisfied that *Williamson County* may not be interpreted to command such a revolutionary concept and draconian result. (Emphasis supplied.)

The circuits thus disagree on the application of claim preclusion following *Williamson* state proceedings, and this Court should intervene.

2. Circuit Conflict on Removal Jurisdiction. As discussed *supra* pp. 13-14, *City of Chicago* allows a municipal defendant to remove a takings case to federal court after a plaintiff's initial state filing. However, the lower courts are split on whether they have jurisdiction to decide Fifth Amendment takings claims that have been so removed. The Seventh Circuit, on remand in *City of Chicago,* decided it could resolve a removed federal takings claim on the merits, despite the lack of prior state litigation. *Int'l Coll. of Surgeons v. City of Chicago,* 153 F.3d 356, 360 (7th Cir. 1998). In contrast, the Eighth Circuit has held it lacked jurisdiction over a federal takings claim that a municipal defendant removed to federal court, precisely because no original state proceedings ripened the federal claim. The stunning aspect of this decision is that the federal court dismissed for lack of jurisdiction, even though the plaintiff filed initially in state court and was forced into federal court upon the city's removal motion. *Koscielski v. City of Minneapolis,* 435 F.3d 898, 903-904 (8th Cir. 2006). The Fifth Circuit has similarly whipsawed a takings plaintiff who filed suit originally in state court, only to see a municipal defendant remove the matter to federal court — and then argue for dismissal because *Williamson*'s state-litigation rule went unsatisfied. The Fifth Circuit rewarded the city for its chutzpah by dismissing the case. See *Sandy*

Creek Investors, Ltd. v. City of Jonestown, 325 F.3d 623, 626 (5th Cir. 2003).

"[C]onsiderations of fairness and justice" lie at the heart of the Takings Clause. *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 333 (2002). It is neither fair nor just to allow a municipal defendant to remove a takings case to federal court, and then seek and receive a dismissal for lack of a prior state ripening suit. The circuits are split on how to handle removed takings cases, and this Court should address the conflict.

3. Circuit Conflict on Application of State-Litigation Rule to Other Constitutional Claims. The lower federal courts also clash on whether the state-litigation rule applies to due process and equal protection claims, in addition to takings claims. In many constitutional property rights cases, plaintiffs assert some combination of takings, due process, and equal protection violations under 42 U.S.C. § 1983. Some circuits restrict *Williamson*'s state remedies requirement to takings claims only.[12] However, the Seventh Circuit, in parsing a land owner's § 1983 claims, held that *Williamson* state procedures apply to takings and due process, but not equal protection. See *Forseth v. Vill.*

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[12] See, *e.g., County Concrete Corp. v. Town of Roxbury,* 442 F.3d 159, 169 (3d Cir. 2006) ("[G]iven that the 'exhaustion of just compensation procedures' requirement only exists due to the 'special nature of the Just Compensation Clause,' it is inapplicable to appellants' facial [substantive due process] and [equal protection] claims"; citations omitted). Accord *Sinaloa Lake Owners Ass'n. v. City of Simi Valley,* 882 F.2d 1398, 1404 (9th Cir. 1989); *Front Royal and Warren County Indus. Park v. Town of Front Royal,* 135 F.3d 275, 283 n.3 (4th Cir. 1998); *McKenzie v. City of White Hall,* 112 F.3d 313, 317 (8th Cir. 1997).

of Sussex, 199 F.3d 363, 370-71 (7th Cir. 2000). The First Circuit has held that state inverse condemnation claims must be exhausted for *both* federal takings and due process claims, without opining on equal protection. See *Ochoa Realty Corp. v. Faria*, 815 F.2d 812, 817 n.4 (1st Cir. 1987). The Second Circuit has extended *Williamson* to its outer limits, requiring ripening state litigation for all three types of claims. See *Dougherty v. Town of No. Hempstead Bd. of Zoning App.*, 282 F.3d 83, 88 (2d Cir. 2002).

The Tenth Circuit has issued two, irreconcilable rulings on this point. It has applied *Williamson*'s state-litigation rule to takings and procedural due process claims brought under § 1983. See *Rocky Mountain Materials & Asphalt, Inc. v. Bd. of County Comm'rs of El Paso County*, 972 F.2d 309, 311 (10th Cir. 1992). Yet it has also ruled that the state-litigation rule is *not* applicable to any claims sounding in takings, due process, or equal protection, because a plaintiff "need not exhaust his available administrative remedies prior to filing a § 1983 action ...." See *Bateman v. City of West Bountiful*, 89 F.3d 704, 708 (10th Cir. 1996). This Court should grant the petition to provide guidance on whether the state-litigation rule encompasses due process and equal protection, as well as takings, claims.

CONCLUSION

The Court should no longer delay its reconsideration of the state-litigation rule. When *Williamson* was decided in 1985, this Court's modern takings jurisprudence was still in its infancy. Indeed, only after *Williamson*, in *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304 (1987), did this Court even decide that monetary compensation was the self-effecting remedy required by the Takings Clause. Since then, the contours of

the Fifth Amendment's substantive protections have become somewhat more defined, but the most basic, fundamental jurisdictional question — "Can a federal court ever decide a federal takings claim?" — remains undeciphered. This is a question of overwhelming constitutional importance.

For the foregoing reasons, the petition should be granted.

August 22, 2007

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APPENDIX A

Cases in which NAHB has participated as an *amicus curiae* or "of counsel" before this Court include: *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 126 S.Ct. 1843 (2006); *Rapanos v. United States*, 126 S.Ct. 2208 (2006); and *John R. Sand and Gravel Co. v. United States*, No. 06-1164 (U.S. *cert.* granted May 29, 2007).

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No. 06-1716

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In the Supreme Court of the United States

SHIRLEY A. ROCKSTEAD ET AL.

Petitioners

v.

CITY OF CRYSTAL LAKE, ILLINOIS

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF AMICI CURIAE FOR ELIZABETH J. NEUMONT (AND ALL OTHERS SIMILARLY SITUATED) IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This brief will address the first question presented by the petition, namely:

Whether the "state procedures" aspect of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-97 (1985), which mandates that property owners exhaust state judicial remedies before pursuing federal claims for just compensation in federal court, should be overruled.

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INTEREST OF AMICI CURIAE

Amici curiae are a certified class of property owners in Monroe County, Florida, who are trying—and have been trying for literally more than a decade—to litigate a federal takings claim in the federal courts. *See generally Neumont v. State of Florida*, 451 F.3d 1284 (11th Cir. 2006). Like petitioners (and thousands of other property owners around the nation), amici are facing "ripeness" arguments by a governmental defendant who seeks to avoid federal adjudication of a federal constitutional claim. In particular, despite class members having filed at least two actions in the state courts concerning the regulatory action for which they now seek just compensation, amici have long been denied their day in federal court because they have assertedly failed to satisfy the "state procedures" requirement established by *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-97 (1985). *See Neumont v. Monroe County, Florida*, 242 F. Supp. 2d 1265, 1274 (S.D. Fla. 2002) (dismissing amici's federal constitutional claims for just compensation "because plaintiffs have failed to exhaust their state remedies").

Accordingly, for themselves and their fellow property owners around the country, amici file this brief to urge the Court to grant the first question presented by petitioners in order to reconsider *Williamson County*'s state procedures requirement. As explained herein, and as petitioners and their amici will elaborate at the merits stage, that requirement was wrong in its inception and is wrong today. The Court should grant the petition and, on the merits, discard the state procedures requirement in its entirety.

With the same counsel of record, amici filed a similar brief at the merits stage in *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323 (2005), there urging the Court to overrule this aspect of *Williamson County*. In addition, amici's counsel of record represented the property owner in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), a regulatory takings case, and he has filed numerous briefs

in takings cases in this Court and in the lower courts, both federal and state.[1]

INTRODUCTION

In one of his final opinions, Chief Justice Rehnquist wrote for himself and three other Justices "to explain why I think part of our decision in *Williamson County* . . . may have been mistaken." *San Remo Hotel*, 545 U.S. at 348 (opinion concurring in the judgment). Although he had joined that decision in 1985, two decades of "further reflection and experience [led him] to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic." *Id.* at 352. Because "no court below ha[d] addressed the correctness of *Williamson County*, [and] neither party has asked us to reconsider it," *id.*, the Chief Justice and his colleagues ultimately determined that reconsideration was not then opportune. But in "an appropriate case," opined Chief Justice Rehnquist, "the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts." *Id.*

As petitioners persuasively argue, *this* is that case. In contrast to *San Remo Hotel*, petitioners' first question presents the issue squarely. On the merits, and as explained herein, the "state procedures" requirement of *Williamson County* "was not correct when it was decided, and it is not correct today"; therefore, the requirement "ought not to remain as binding precedent." *Lawrence v. Texas*, 539 U.S. 558, 578 (2004). In a word, it should be *overruled*.

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. It is important to comprehend the precise federal right at issue in cases within the sweep of the state procedures requirement. The property owner in such cases sues to enforce a right to recover just compensation for a taking. That right, and the corresponding obligation of the government to pay just compensation, was always understood to accrue or arise at the time of the taking, and not later. In asserting that the right and the obligation accrued at some later point after the denial of state-law remedies in a state court, *Williamson County* deviated sharply from the established understanding of the Just Compensation Clause.

2. The state procedures requirement was not one of the questions presented in *Williamson County*, and so it received only the most cursory treatment in the briefing and argument. Not surprisingly, therefore, the requirement is poorly reasoned. It rests principally on two flawed analogies to inapposite decisions that decree the unavailability of (1) equitable relief against compensable takings, and of (2) relief under the Due Process Clause for random and unauthorized deprivations of property, neither of which is remotely at issue. Nor can the requirement be justified by the principle that the Fifth Amendment proscribes only takings *without just compensation*, which supports a no-equitable-relief rule but not exhaustion of state judicial remedies.

3. The state procedures requirement has other defects that show its doctrinal incoherence. Among these are that the requirement is really an exhaustion mandate that conflicts with the no-exhaustion-of-remedies rule governing other federal rights, as twice recognized in bills passed by the House of Representatives. In addition, the requirement is in practice ignored by state courts (and by this Court in cases originating from state courts), even though it logically should apply in those fora. Finally, though touted as promoting local decisionmaking, the requirement affirmatively invites *dis*respect for state courts by treating them as mere stations on the road to federal court.

ARGUMENT

For the following reasons, the Court should grant the petition in order to give plenary consideration to overruling the state procedures requirement fabricated in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-97 (1985).

I. In Creating the State Procedures Requirement, *Williamson County* Deviated Sharply from the Established Understanding of the Just Compensation Clause.

As petitioners note, "the district court dismissed this case on the grounds of lack of *Williamson County* ripeness, ruling that petitioners should have appealed the [state trial court's] dismissal of their state inverse condemnation claim to the Illinois appellate courts." Pet. 10. That petitioners felt they had to litigate in state court at all is, of course, a consequence of the cited decision, which this Court handed down in 1985. The "state procedures" requirement of *Williamson County*—so called to distinguish it from the "final decision" requirement, which is not at issue here—decreed that property owners must "seek compensation through the [state-law] procedures the State has provided for doing so" before presenting to a federal court their federal claims for just compensation. 473 U.S. at 194.

A. At Issue Here Is the Right to Recover Just Compensation for Takings of Private Property for Public Use.

In fabricating the state procedures requirement, the *Williamson County* opinion referred to a property owner's claiming or suffering "a violation of the Just Compensation Clause." 472 U.S. at 194-95; *accord id.* at 195 n.13 (referring to a "constitutional violation" stemming from a taking of property). Though it is not unusual to employ the term *violation* in a loose sense in connection with a claim for just compensation, this terminology obscures the true "nature of the constitutional right" at issue. *Id.* Property owners who

pursue just compensation in court under the Fifth Amendment do not claim "constitutional violations" in the sense that they sue to enjoin or remedy state action that violates or transgresses constitutional norms. Rather, as the Court articulated in *First English Evangelical Lutheran Church v. County of Los Angeles*, these property owners sue to enforce the government's "constitutional obligation to pay just compensation" along with their corresponding "right to recover just compensation." 482 U.S. 304, 315 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960), and *Jacobs v. United States*, 290 U.S. 13, 16 (1933)). Thus, the owners are pursuing a monetary remedy that is "grounded in the Constitution itself." *Id.* at 315.

B. It Was Always the Law that the Right to Recover Just Compensation Accrues at the Time of the Taking.

When does the government's constitutional obligation to pay just compensation arise? Or, to ask the same thing, when does a property owner's claim for just compensation accrue? The answer is that the taking, the obligation of the taker to pay just compensation, and the owner's claim for compensation come into being simultaneously, as this Court and the lower federal courts consistently held for decades prior to *Williamson County*. This Court has explained:

> When a taking occurs by physical invasion, . . . the usual rule is that the time of the invasion constitutes the act of taking, and "[it] is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued . . . ."

United States v. Clarke, 445 U.S. 253, 258 (1980) (quoting *United States v. Dow*, 357 U.S. 17, 22 (1958)).

Numerous decisions of this Court state essentially the same rule using slightly different phraseology. In *United States v. Dickinson*, 331 U.S. 745 (1947), the Court rejected the government's argument that Dickinson's reclamation of

a portion of property previously taken by flooding rendered him ineligible to be paid for the original taking: "[N]o use to which Dickinson could subsequently put the property by his reclamation efforts changed the fact that the land was taken when it was taken and *an obligation to pay for it then arose.*" *Id.* at 751 (emphasis added). In *Soriano v. United States*, 352 U.S. 270, 275 (1957), the Court affirmed as time-barred the dismissal of petitioner's claim against the government "for just compensation for supplies . . . taken from him . . . during the Japanese occupation of the Philippines." As it rejected petitioner's argument that the hostilities tolled the applicable statute of limitations, the Court agreed that petitioner's compensation claim "accrued at the time of the taking." *Id.*; *accord United States v. Rogers*, 255 U.S. 163, 169 (1921) (Having taken plaintiffs' lands, "it was the duty of the government to make just compensation as of the time when the owners were deprived of their property.").[2]

In short, it was the consistent rule of this Court and of the lower federal courts for many decades that the constitutional obligation to pay just compensation arises, and the claim for just compensation accrues, at the time of the taking. Whether stated that the event of taking "gives rise to the claim for compensation," *Dow*, 357 U.S. at 22; *Clarke*, 445 U.S. at 258, or that the obligation to pay just compensation is triggered "[a]s soon as private property has been taken," *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting), the rule was well-established. Therefore, in asserting that a property owner's monetary claim under the Just Compensation Clause does not accrue "until just compensation has been denied" by the state judicial system, 473 U.S. at 195 n.13, *Williamson County* deviated sharply from the traditional understanding of that Clause.

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[2] The law in the old Court of Claims was the same. *See, e.g., Steel Improvement & Forge Co. v. United States*, 355 F.2d 627, 631 (Ct. Cl. 1966) ("It is axiomatic that a cause of action for an unconstitutional taking accrues at the time the taking occurs.").

II. In Creating the State Procedures Requirement, *Williamson County* Built a House on Jurisprudential Sand.

Did such a sharp deviation from decades of consistent constitutional interpretation come after sustained reflection in the face of compelling new authority? Was the state procedures requirement forged in the fires of intensive and extensive doctrinal reassessment in light of developments in the law of just compensation? In a word, ***no***. In fact, quite the opposite: as explained below, the requirement was fabricated without benefit of serious briefing or argument, and it rests principally on flawed analogies to inapposite cases, as well as other misreadings of precedent.

A. The Requirement Was Fabricated Without Benefit of Serious Briefing or Argument.

In the Court's own words, it granted certiorari in the *Williamson County* case to decide "whether Federal, State, and Local governments must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulations." 473 U.S. at 185. The attorneys general of 19 states and territories, together with the Solicitor General of the United States, the National Association of Counties, the City of New York, and the City of St. Petersburg, Florida, joined the petitioner in urging the Court to reverse the court of appeals' judgment in favor of the property owner on two alternative grounds: "that a *temporary* regulatory interference with an investor's profit expectation does not constitute a 'taking,'" and "that even if such interference does constitute a taking, the Just Compensation Clause does not require *money damages* as recompense." *Id.* at 175 (emphases added). Four professional and public-interest organizations filed amicus curiae briefs urging affirmance of the judgment. *See id.* at 174.

In the end, all of this briefing was for naught, because the Court did not decide the questions presented. Instead, *Williamson County* left the temporary takings issue "for another day," as it concluded that the property owner's claim

for just compensation was "premature." *Id.* at 186; *cf. First English*, 482 U.S. at 310 (deciding the issue after observing that *Williamson County*, among other cases, had left it undecided). The conclusion that the just compensation claim was premature rested primarily on the Court's applying the rule that a regulatory takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.*; *see also id.* at 186-94 (explicating this "final decision" requirement).

Logically, the opinion could have stopped at that point, but it did not. Instead, the opinion put forth a "second reason [why] the taking[s] claim is not yet ripe," namely, that the property owner "did not seek compensation through the procedures the State has provided for doing so." *Id.* at 194. Of the twelve merits briefs filed in *Williamson County*, only the Solicitor General's amicus brief—and only in a single paragraph in its *Summary* of Argument—argued for anything approaching this "second reason." *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 10; *see also* Brief for Respondent at 39 (responding to point in two short paragraphs). Furthermore, although the "state procedures" issue did arise very briefly at oral argument in *Williamson County*, the Solicitor General's representative refused even to give an unequivocal answer to the question whether "a property owner would have to follow judicial review remedies as well for [regulatory action] to ripen into a taking." 1985 U.S. TRANS LEXIS 76, at *25-26 (Feb. 19, 1985); *see also id.* at *26 ("I think it tends to blend in with the question of whether there should be abstention on the state law question of whether the commission had properly applied state law.").

B. The Requirement Rests Principally on Two Flawed Analogies to Inapposite Decisions.

There are very good reasons why the Court "ordinarily do[es] not consider questions outside those presented in the petition for certiorari," and why the Court disregards that

rule "only in the most exceptional cases." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). The "state procedures" aspect of *Williamson County* is a perfect illustration of such reasons. Given that the questions presented did not even touch on state judicial remedies and that the matter did not receive serious briefing or argument, it is no surprise that the fabrication of the state procedures requirement rested principally on two flawed analogies to inapposite decisions.

1. *Ruckelshaus v. Monsanto Co.*

First, the opinion cited *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-20 (1984), for the notion that "takings claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." 473 U.S. at 195. From this notion, the opinion purported to draw an analogy: "Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." Granting that the analogy is not wholly implausible, the premise is wholly bogus. If "takings claims" are meant in this passage to refer to monetary claims for just compensation for completed takings of private property—the very claim that the property owner asserted in *Williamson County*—then the cited passage in *Monsanto* did not even consider such claims, let alone declare them "premature" until after the property owner had sued the United States under the Tucker Act.[3]

In *Monsanto*, a company sued in federal district court "seeking *injunctive and declaratory relief* from the operation of" various provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), alleging that "all of the challenged provisions effected a 'taking' of property without just

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[3] The Tucker Act grants the Court of Federal Claims subject matter jurisdiction over "any claim against the United States founded upon . . . the Constitution," 28 U.S.C. § 1491(a)(1), including monetary claims for just compensation under the Fifth Amendment.

compensation, in violation of the Fifth Amendment." 467 U.S. at 998-99 (emphasis added). Having concluded that some of the challenged provisions might conceivably operate to take the company's property in some circumstances, the Court proceeded to consider (in the passage later cited by *Williamson County*) whether that conclusion supported the requested injunctive relief. *Monsanto* ruled that it did not, based on the established rule that "[e]*quitable relief* is not available to enjoin an alleged taking of private property for public use . . . when a suit for compensation can be brought against the sovereign subsequent to the taking." *Id.* at 1016 (emphasis added); *see also id.* at 1017-19 (concluding that such a suit could be brought under the Tucker Act). Thus, the company's request for equitable relief under the Fifth Amendment was not merely *premature*, it was *not available at all*. In other words, there was nothing the company could do to "ripen" its claim for equitable relief; that claim simply had no merit, period.

What about a Tucker Act suit against the government in the Court of Federal Claims? Could such a suit be called a *prerequisite* to asserting a *monetary* claim against the government for just compensation for a taking of property? No, as the *Monsanto* decision confirms, a Tucker Act suit *is* the assertion of a claim for just compensation: "whatever taking may occur is one for public use, and a Tucker Act remedy is available to provide Monsanto with just compensation." *Id.* at 1020; *accord supra* note 3. So if *Williamson County* were correct that a property owner must "avail[] itself of the process provided by the Tucker Act" *before* pursuing its claim for just compensation, 473 U.S. at 195, then it would be the rule that a property owner must essentially bring a Tucker Act suit before bringing a Tucker Act suit. In other words, an owner's Tucker Act suit for just compensation would be "premature" until the property owner had brought a Tucker Act suit for just compensation. *Id.* Obviously, this *reductio ad absurdum* deserves no respect, and *Monsanto* provides no reasoned basis for the state procedures requirement.

2. *Parratt v. Taylor*

The fabrication of the state procedures requirement in *Williamson County* also rested on the supposed analogy between takings of private property "without just compensation" and deprivations of property "without due process of law." The Court relied on *Parratt v. Taylor*, 451 U.S. 527 (1981), which it described as having "ruled that a person deprived of property through a random and unauthorized act by a state employee does not state a claim under the Due Process Clause merely by alleging the deprivation of property." 473 U.S. at 195. In such circumstances, "the State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.'" *Id.* (quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984)). Then, another purported analogy: "Likewise, because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not 'complete' until the State fails to provide adequate compensation for the taking." *Id.*

This analogy has two fatal flaws. First, it provides no support for the go-first-to-state-court requirement actually imposed by the second prong of *Williamson County*. When a state does indeed "provide an adequate postdeprivation remedy for the property loss" as contemplated by *Parratt*, the deprived property owner does not pursue that state-law remedy *before* suing in federal court under the Due Process Clause. To the contrary, the property owner must pursue the state-law remedy *instead of* suing in federal court. As *Williamson County* put it, the owner who has such a remedy categorically "does not state a claim under the Due Process Clause." 473 U.S. at 195. If the analogy with the Just Compensation Clause were valid, the property owner having a state-law remedy for just compensation categorically could not state a claim under the Just Compensation Clause *in any court*. Obviously, no one believes that, then or now.

Second, and more important, the specific notion that "the State's action [in respect to a taking] is not 'complete' until the State fails to provide adequate compensation for the taking," *id.*, is flatly contrary to the Court's sustained and reasoned consideration of the matter in *First English*. There, the Court held that the government's taking of property, without more, gives rise to an "obligation to pay just compensation" on the part of the government, and a corresponding "right to recover just compensation" on the part of the owner. 482 U.S. at 315. While a postdeprivation remedy might allow the government to escape liability for a denial of procedural due process (as in *Parratt*), once a taking has occurred, governmental liability for just compensation is inescapable: "*no subsequent action* by the government can relieve it of the duty to provide compensation." *Id.* at 321 (emphasis added). This formulation has continued to command the Court's assent. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 328 (2002) (quoting passage and opining that "nothing that we say today qualifies [that] holding" of *First English*).

C. The Requirement Finds No Support in the Principle that the Amendment Proscribes Only Takings *Without Just Compensation*.

Along with flawed analogies to *Monsanto* and *Parratt*, *Williamson County* relied on the uncontroversial principle that the "Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." 473 U.S. at 194. Indeed, this principle was so significant that the opinion both reiterated and emphasized the point: "because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied." *Id.* at 195 n.13.

Both of these propositions are quite true; both are also quite irrelevant to whether property owners must seek just compensation in state court under state law. As explained in Part I.A above (pp. 4-5), property owners who seek just compensation under the Fifth Amendment are not seeking

to "proscribe" (i.e., enjoin) takings, and they are not asserting "constitutional violations." Instead, they are asserting a federal "right to recover just compensation," the monetary remedy that is "grounded in the Constitution itself."

To put the point another way, the principle that the Fifth Amendment proscribes (only) those takings that are without just compensation leads not to the state procedures requirement but rather to the rule (reiterated in *Monsanto*) that "[e]quitable relief is not available to enjoin an alleged taking of private property for public use . . . when a suit for compensation can be brought against the sovereign subsequent to the taking." 467 U.S. at 1016, *discussed at supra* p. 10. That is, the "proscribes takings without just compensation" point cited by *Williamson County* is a fine basis for rebuffing property owners who ask federal courts to *enjoin state regulatory programs*; however, it is no basis at all for rebuffing property owners who ask federal courts to *award just compensation*.

III. The State Procedures Requirement Has Other Defects that Show Its Doctrinal Incoherence.

If *Williamson County*'s state procedures requirement was not correct when it was decided, then it is also defective in additional ways that have come to light in the past two decades. Petitioners have catalogued the extensive scholarship that has illuminated the depths to which *Williamson County* has brought takings procedure. *See* Pet. 15-16 n.10. In the following sections, amici discuss three other defects.

A. The Requirement Is Inconsistent with the No-Exhaustion-of-Remedies Rule Governing Other Federal Rights.

The intended effect of *Williamson County*'s state procedures requirement is to remit property owners with what had long been described as "accrued" *federal* claims for just compensation, *Soriano*, 352 U.S. at 275, to *state* courts to pursue remedies under *state* law. This result is anomalous on its face, and it is especially jarring in light of the Court's

long-standing and firm refusal, with respect to *other* federal claims asserted pursuant to 42 U.S.C. § 1983, to "require[] exhaustion of state *judicial* . . . remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974) (emphasis added), *quoted in Patsy v. Board of Regents*, 457 U.S. 496, 500 (1982). In practice, therefore, the state procedures requirement has effectively caused the Just Compensation Clause, "as much a part of the Bill of Rights as the First Amendment or [the] Fourth Amendment, [to] be relegated to the status of a poor relation," notwithstanding the Court's protestations to the contrary in *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

The House of Representatives views the state procedures requirement as an "exhaustion" mechanism applying only to claims for just compensation, and has twice passed bills to eliminate it.[4] The House Judiciary Committee's report on the latter bill made clear that the non-exhaustion provision had as its target *Williamson County*'s state procedures requirement because the House viewed the requirement as a kind of exhaustion-of-judicial-remedies rule that was *rejected* in *Steffel*, *Patsy*, and many other decisions of this Court. *See* H.R. Rep. No. 106-518, at 13 & n.3 (2000). The committee report explained that the "combined effect of *Williamson County*, and the application of issue and claim preclusion [as presented in this case], is to drive out of Federal court virtually all Federal claims for just compensation

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[4] *See* Private Property Rights Implementation Act of 1997, H.R. 1534, 105th Cong., § 2 (adding 28 U.S.C. § 1343(e)(3) to provide that property owners seeking to enforce the Just Compensation Clause pursuant to 42 U.S.C. § 1983 need not "exhaust judicial remedies provided by any State or territory"); Private Property Rights Implementation Act of 2000, H.R. 2372, 106th Cong., § 2 (adding 28 U.S.C. § 1343(e)(4) to provide that claims for just compensation asserted pursuant to § 1983 are "ripe for adjudication even if the party seeking redress does not exhaust judicial remedies provided by any State or territory").

for takings of private property by local governments." *Id.* at 13. As a result of the state procedures requirement, then, "property rights are procedurally disadvantaged compared to other civil rights." *Id.* (section heading).

B. The Requirement Is in Practice Ignored by State Courts and by this Court.

If the state procedures requirement truly derives from the "nature" of the federal right to just compensation—as opposed to being merely a "procedural scheme under which claims may be heard in federal courts," *Patsy*, 457 U.S. at 501—then the requirement necessarily governs regardless of the judicial forum in which the federal right is asserted. That is, under the logic of *Williamson County*, "a property owner cannot claim a violation of the Just Compensation Clause" *even in state court* until he has used the "procedure for seeking just compensation" provided by the state. 473 U.S. at 195. In other words, no *federal* claim for just compensation may be presented to a *state* court until the owner has fully (and unsuccessfully) litigated his state-law claim for compensation (in the state judicial system).

This precept follows unassailably from the state procedures requirement; this precept is also uniformly ignored both by state courts themselves and by this Court. As for state courts, amici are aware of none that refuses to adjudicate *federal* claims for just compensation on the ground that they are premature until a property owner has pursued to completion all claims for compensation under *state* law. To the contrary, it is not difficult to cite numerous examples of state judicial systems that will hear and determine federal claims for just compensation *before* state-law compensation claims have been fully litigated.[5]

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[5] *See, e.g., Jacobs Wind Electric Co. v. Department of Transportation*, 626 So. 2d 1333, 1337 (Fla. 1993) (contemplating that a patent holder would assert its claims under the Just Compensation Clause *along with* its claims under the state analogue thereto and

(continued...)

As for this Court, consider the last two pure regulatory takings cases it has entertained on certiorari to state courts. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1009 (1992), the Court observed that following enactment of the relevant state statute, "Lucas promptly filed suit in the South Carolina Court of Common Pleas, contending that the Beachfront Management Act's construction bar effected a taking of his property without just compensation." Even though the Court postponed its discussion of the merits to address whether Lucas had satisfied *Williamson County*'s "final decision" requirement, *see id.* at 1010-14, the Court was not concerned in the least whether Lucas had also satisfied *Williamson County*'s "state procedures" requirement by litigating to completion whatever state-law claims for compensation he might have prior to asserting his federal claim for just compensation.

Likewise, in *Palazzolo v. Rhode Island*, 533 U.S. 606, 611 (2001), the Court observed that following proceedings before the state Coastal Resources Management Council, Palazzolo "sued in state court, asserting the Council's application of its wetlands regulations took the property without compensation in violation of the Takings Clause of the Fifth Amendment." Again, while the Court addressed the final

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[5] (...continued)
under state common law); *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851, 855 (Cal. 1997) (observing that the property owner brought a claim for "'just compensation' in the form of lost rental income and interest" under both "article I, section 19 of the California Constitution and the Fifth Amendment of the United States Constitution"), *cert. denied*, 522 U.S. 1077 (1998); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 930 (Tex. 1997) (finding ripe the plaintiff's "just compensation takings claims" brought at the same time "under the United States Constitution and Texas Constitution"); *Palazzolo v. State*, 746 A.2d 707, 711 (R.I. 2000) (observing that plaintiff "brought an inverse condemnation action" that asserted "a taking of his property for which he was entitled to compensation pursuant to the United States and Rhode Island Constitutions"), *aff'd in part, rev'd in part*, 533 U.S. 606 (2001).

decision requirement at length, *see id.* at 618-26, it gave no attention to the state procedures requirement. In contrast to *Williamson County*, the Court certainly did not go out of its way to assure itself that, *before* Palazzolo first asserted his federal claim for just compensation, he did indeed "seek compensation through the procedures the State has provided for doing so."

C. The Requirement Invites Disrespect for State Courts by Treating Them as Mere Stations on the Road to Federal Court.

In a letter expressing its (unsuccessful) opposition to passage by the House of a bill eliminating the state procedures requirement, *see supra* note 4 and accompanying text, the Department of Justice cited "'a proper respect for State functions'" in arguing that "State courts are as capable as Federal courts in adjudicating local land use cases." H.R. Rep. No. 106-518, at 37, 42 (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)). These arguments naturally evoke the decisions of this Court that call for a "proper respect for the ability of state courts to resolve federal questions presented in state-court litigation." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987). Amici concur with the Department that this respect should influence the Court's thinking about the state procedures requirement. As set forth below, however, the requirement actually invites *dis*respect for state courts and their ability to resolve federal questions.

It has long been recognized that, notwithstanding "the paramount role Congress has assigned to the federal courts to protect constitutional rights," *Steffel*, 415 U.S. at 473, as a general matter "the state and federal courts have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States." *Grubb v. Public Utilities Commission*, 281 U.S. 470, 476 (1930); *accord, e.g., Tafflin v. Levitt*, 493 U.S. 455, 459 (1990). Monetary claims under the Just Compensation Clause are within this general rule, and state courts routinely adjudicate such federal claims against state and local governments.

Consider a procedural regime in which both the state courts and the lower federal courts adjudicate the federal claims for just compensation respectively presented to each. Property owners who agree with the Justice Department's prediction that "State courts are likely to be as sympathetic to local property owners as Federal courts," H.R. Rep. No. 106-518, at 37, will naturally gravitate toward the former; those who disagree, the latter. Each court system will develop federal takings law subject to this Court's review and, significantly, without interference from the other. Such a regime would not only yield more efficient decisionmaking, it would also truly show that "proper respect for ability of state courts to resolve federal questions presented in state-court litigation" enunciated in *Pennzoil Co.*, 481 U.S. at 14.

By contrast, consider the regime created by the state procedures requirement of *Williamson County*. Under that regime, federal courts consider state courts not as parallel departments of a dual sovereign but rather as "hurdles" to be overcome on the road to resolution of claims by federal courts. *E.g., Richardson v. City & County of Honolulu*, 124 F.3d 1150, 1165 (9th Cir. 1997), *cert. denied*, 525 U.S. 871, 921, 1018 (1998); *Eide v. Sarasota County*, 908 F.2d 716, 720-21 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991). Moreover, federal courts send property owners packing off to state courts to litigate state-law claims they do not wish to pursue and to obtain rulings that may have absolutely no consequence in subsequent federal proceedings. Forcing pointless detours to state courts to litigate sideshow issues demonstrates affirmative *dis*respect for those courts rather than the requisite proper respect.

CONCLUSION

As the Court has often reiterated, the doctrine of *stare decisis* is "not . . . an inexorable command." *Lawrence*, 539 U.S. at 577 (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)). It is, instead, "a principle of policy" that must yield when the rationale of a prior decision "does not withstand careful analysis." *Id.* As this brief has demonstrated, the

state procedures requirement of *Williamson County* cannot withstand such analysis: it was fashioned in circumstances that warrant no confidence its soundness, and "precedents before and after its issuance contradict its central holding." *Id.* Although state and local governments "rely" on it as a ready means to exhaust property owners having the temerity to assert federal claims for just compensation, "there has been no individual or societal reliance on [the requirement] of the sort that could counsel against overturning its holding once there are compelling reasons to do so." *Id.*

This last point is crucial, for we may expect a chorus from respondent and its amici regarding how the state procedures requirement is a pillar of Western Civilization and how overruling it will usher in a new Dark Ages. We think this chorus is largely driven by the desire of governments and their allies to narrow the substantive scope of takings law. While that desire is understandable and, in the proper case, a legitimate litigating position, we are confident that all Members of this Court will resist the temptation to treat the state procedures requirement as a stand-in for disputing the substantive reach of the Just Compensation Clause. Whether that Clause affords broad relief to property owners, narrow relief, or even no relief at all, should not matter here: in accord with "the paramount role Congress has assigned to the federal courts to protect constitutional rights," *Steffel*, 415 U.S. at 473, the answers to that question ought to be resolved in federal court without requiring exhaustion of state-law remedies in state court.

As the Court has repeatedly stated, when "governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent." *Seminole Tribe v. Florida*, 517 U.S. 44, 63 (1996) (quoting *Payne*, 501 U.S. at 827). The Court should not feel constrained here: this is the "appropriate case" to reconsider—and ultimately overrule—the unworkable and badly reasoned state procedures requirement of *Williamson County*.

The petition for writ of certiorari should be granted.

Respectfully submitted.

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